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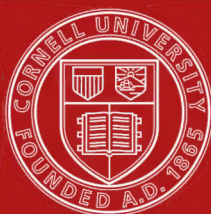
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REEVES'  
HISTORY OF THE ENGLISH LAW.

EDITED BY  
W. F. FINLASON.

VOL. II.





REEVES'  
HISTORY OF THE ENGLISH LAW,  
FROM THE  
TIME OF THE ROMANS  
TO THE  
END OF THE REIGN OF ELIZABETH.

WITH NUMEROUS NOTES, AND AN INTRODUCTORY DISSERTATION ON THE  
NATURE AND USE OF LEGAL HISTORY, THE RISE AND PROGRESS  
OF OUR LAWS, AND THE INFLUENCE OF THE ROMAN  
LAW IN THE FORMATION OF OUR OWN.

BY  
W. F. FINLASON, Esq.,  
BARRISTER-AT-LAW.

*A New American Edition,*  
COMPLETE IN FIVE VOLUMES.

VOL. II.  
FROM THE REIGN OF HENRY III. TO THE REIGN OF  
EDWARD II.

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# HISTORY OF THE ENGLISH LAW.

## CHAPTER V.

### HENRY III.

MAGNA CHARTA — TENURES — ALIENATION — MORTMAIN — COMMUNIA PLACITA NON SEQUANTUR CURIAM NOSTRAM — JUSTICES OF ASSIZE — AMERCEMENTS — NULLUS LIBER HOMO, ETC. — PRÆCIPE IN CAPITE — SHERIFF'S CRIMINAL JUDICATURE — THE WRIT DE ODIO ET ATIA — CHARTA DE FORESTA — THE JUDICATURE OF THE FOREST — PUNISHMENTS — CHARTERS CONFIRMED — STATUTUM HIBERNIÆ — STATUTE OF MERTON — OF COMMONS — OF SPECIAL BASTARDY — RANKS OF PERSONS — OF VILLENAGE — OF FREE SERVICES — OF SERJEANTY — SCUTAGIUM — HOMAGE AND FEALTY — OF WARDSHIP AND MARRIAGE — OF GIFTS OF LAND — BY WHOM — TO WHOM — OF SIMPLE GIFTS — OF CONDITIONAL GIFTS — OF ESTATES BY THE COURTESY — OF REVERSIONS — GIFTS AD TERMINUM — LIVERY — RIGHTS — TESTAMENTS — ECCLESIASTICAL JURISDICTION THEREIN — OF DESCENT — DE PARTU SUPPOSITO — OF PARTITION — DOWER.

HAVING travelled through the early periods of our law, through the profound darkness of the Saxon times, and the obscure mist in which the Norman constitutions are involved (*a*), we approach the confines of known and established law. In the reign of Henry III. begins the order of statutes on which legal opinions may be founded with certainty. Whatever statutes were passed before this reign, and whatever remembrance we may have of them in annals and histories of the time, they are considered as little more than the remains of antiquity, that illustrate indeed the inquiries of the curious, but add nothing to the body of legal learning.

(*a*) It is impossible not to observe that this darkness would have been lightened and this mist dispersed, had the author been more acquainted with the sources of information open to him, especially the contents of the Saxon laws and the *Mirror of Justice*, and with the compilation called the *Laws of Henry I.* The satisfaction he expresses at having reached the realm of statute law and regular legal treatises, which would enable him to state what the law was at this and any subsequent period of his history, betrays the idea in his mind that thus to state the law at successive stages is all that is involved in legal history. It is conceived, however, that it is desirable, as much as possible, to show the connection between these different stages and the causes which have led to the changes to be observed. And this object it has been endeavored, however imperfectly, to aid in the notes.

*Magna Charta*, and the statutes of Merton and Marlbridge, passed in this reign, lie within the pale of the English law as now understood; and furnish topics for argument, and grounds for judicial decision. From this time the history of our law becomes more authentic and certain. The constitutions now made produce determined effects; we can trace in what manner they were afterwards altered and modified; can generally fix the era of such alterations; and can always rest secure in the probability of our deductions, while we behold the consequences of them in the present state of our law.

If the statutes furnish authentic documents on which we may rely with confidence, the grounds and principles of the law are investigated and discussed by an author of this reign, whose work may be considered as the basis of all legal learning; the treatise of Bracton will enable us to speak decidedly and fully upon every title in the law, whether civil or criminal. The sketch we have just given from Glanville will now be filled up, and its deficiencies supplied; many of the obscure hints, the doubts, and ambiguities with which that author abounds, will be elucidated; and the whole of our law explained with consistency, and upon undeniable authority. These are the materials from which the juridical history of this king's reign is to be collected. For the matter which they furnish, it may not be raising the expectations of the reader too high, to promise him a full gratification of his thirst for legal antiquities, and the knowledge of judicial proceedings in all their branches. It is rather to be feared, that every one may not entirely assent to the reasons which induced us to enter so minutely into the detail of things; it is thought, however, that it would be less pardonable to give a scanty relation, where the sort of information which is most likely to engage the curiosity of a lawyer depends very often upon circumstances and passages apparently trifling.

The reign of this king, and the remainder of this History, will be divided, conformably with the nature of the materials from which it is formed, into the alterations made by statute, and those made by usage and the decisions of courts. These two sources of variation will be pursued separately, and the amendments made by either stated distinctly, and by themselves. We shall first con-



sider the statutes, and then the decisions of courts. In the present reign we begin with *Magna Charta*, 9 Hen. III., that being the earliest statute we have on record.

Henry III. in the first year of his reign, on the 12th of November, 1216, being then only nine years old, by the advice of Gualo, the pope's legate, and of the Earl of Pembroke, in the grand council of the realm, renewed the Great Charter which had been granted by his father, together with such alterations and amendments as the circumstances of the times had made necessary.<sup>1</sup> In the September or November following, a new *Magna Charta* was sealed by the pope's legate and the Earl of Pembroke, with several additional improvements; at which time the clauses relating to the Forest were first thrown into a separate charter, making the *Charta de Forestâ*.<sup>2</sup>

When the king was declared of age, it was thought that so important an act of his infancy as this should be confirmed; accordingly, in the ninth year of his reign he confirmed the act of the pope's legate and the Earl of Pembroke; and granted *Magna Charta* and *Charta de Forestâ* in the form in which they had sealed it, and as we now have them.<sup>3</sup>

Thus was the text of *Magna Charta* and *Charta de Forestâ*, after many alterations, finally settled; nor has there in succeeding times been any amendment made therein. The solicitude of later ages was to obtain frequent confirmations, and a strict observance of these grand pillars of our constitution; by occasional interpretations to explain any difficulties which might appear in the construction of them; and to enlarge the benefits they were designed to confer. What were the benefits, liberties, and advantages secured to the people by these famous charters (a), and what is the form and style in

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(a) This, which is one of the most interesting questions in our legal history, cannot be understood without some reference to contemporary history. There can be no doubt, it appears on the face of the charters, and is a notorious historical fact, that the barons were the main promoters of the charter; and *a priori* it might be expected that they would be directed, primarily and principally, at their protection from the exactions and oppressions of the sovereign under the feudal system; and there can be no doubt that those oppressions and exactions had been enormous, and that some of the most revolting features of the feudal system, especially with reference to the custody of female wards, had been grossly abused by the sovereign, and more particularly by John. There is a passage in the *History* of Sir J. Mackin-

<sup>1</sup> 2 Bla. *Tracts*, ii., Intr., 42.

<sup>2</sup> *Ibid.*, pp. 52, 60.

<sup>3</sup> *Ibid.*, p. 69.

which they are conceived, it is now our business to inquire.

tosh in which he hints that this sovereign had so abused the facilities afforded by these wardships, and contemporary history quite bears out the suggestion. Naturally enough, therefore, the barons would direct their efforts mainly to the restraint of the arbitrary power of the crown with reference to the incidents of the feudal system, which, it will be observed, only applied to those who held by military tenure, and not, therefore, directly to the great body of the people; those who held of the military tenants by socage or villenage—that is, by plough-service, or the dwellers in towns and cities, who, if they held of the crown at all, held by burgage-tenure, and could only be subject to pecuniary exactions. On the other hand, it is to be borne in mind that the incidents of the feudal system applied as between the barons and their military tenants, not less than between the sovereign and the barons; and contemporary history shows that all the oppressions and exactions which the sovereign practised upon them, they, with a hundredfold greater cruelty and rapacity, practised upon others. This is equally manifest whether we turn to the contemporary chronicles, or take the account given by an acute modern historian, such as Sir J. Mackintosh. The latter indeed quotes from the chronicles some passages which present a terrible picture of the oppressions and cruelties practised by the barons and their knights upon the people all over the country. And there was this terrible difference between their oppressions and those of the king, that they were everywhere, whereas his tyranny was necessarily somewhat limited by the localities in which he happened to reside. In every county, however, there were a host of these feudal barons and knights, each with a fortress or castle, in which was a dungeon, and where the most abominable cruelties were perpetrated, without any possibility of aid from the law, except in the form of armed force and a regular siege of the castle. Hence, in some instances, indeed, as in one very remarkable case in 1224, when one Falcon de Breaute actually seized upon the king's justices, and imprisoned them in his castle, Henry III. had to lay siege to his castle for two months with a strong force in order to take it, and thus vindicate the law and rescue his judges. This singular incident, which is narrated in all the chronicles under the year 1224, and occurred, be it observed, in the year when the charter was for the third time ratified by Henry III., will do much to illustrate the character of the age and the real nature of the charter, especially, for instance, as to the remarkable stipulation put into the mouth of the sovereign in the cardinal clause—the celebrated "*nullus liber homo*" clause—which is so often quoted as the palladium of our liberties, "*nec super eum ibimus*," i. e., we will not come upon him with an armed force; "*nisi per legem terræ*," i. e., by the sheriff or his officers, who would doubtless have been hanged by such gentlemen as Falcon de Breaute over their castle walls, if they had dared to attempt to interfere with them. Read by the light of contemporary history, this clause, which is so loudly vaunted as the palladium of liberty, did but give impunity to tyranny. For in that age, when the civil power was so weak as to be powerless against the military barons and knights, each secure in his castle—to say that they should only be touched by the ordinary course of law was to say that they should enjoy impunity. A reference to the chronicles between the years 1216 and 1224 will show that in every part of the country the barons were practising the most terrible oppressions, although it is equally true that the king, on his part, was practising, whenever he could, the most terrible cruelties upon them, and that in point of cruelty he perhaps surpassed them, though not in rapacity. In such a state of things, of course they would naturally be very anxious to protect themselves, although, as regarded the great body

The copy of *Magna Charta* in our statute-book is taken from the roll of 25 Edw. I., and is only an *Insperimus* of

- of the people, they were the oppressors. And the point of greatest interest in the charter is how far there were any provisions introduced for the protection of the people. The people, be it observed, were out of the scope of the feudal system, in its strict and proper sense, which was purely military. They held, whether as freeholders or as villeins, by plough-service, or such other rustic service, or they held in burgage. They, therefore, were not subject to those incidents of the feudal system which afforded so many pretexts for oppression; and the aggressions upon them were of a wholly different and more lawless character, which may be gathered pretty clearly from the chronicles and the *Mirror*; violent seizures of their property, under color of distresses, or seizures of their persons to extort ransoms, by imprisonment in their numerous castles, of which there were many hundreds—upwards of a thousand—in different parts of England, each governed by a warden or “constable,” that term not signifying, as it does now, a peace-officer, but a very different sort of character, the keeper of some strong fortress, with a deep dungeon, the scene of dreadful cruelties and extortions. Then the rivers, which then were swarming with fish (not having been befouled and polluted by towns), were too often monopolized by the local tyrants by means of “weirs” or fishing dams. And merchants were subject to ruthless extortions, under the name of tolls, in going through the lands of these feudal tyrants to get to the towns where they carried on trade. Thus on every side the people were subject to oppressions, and robberies, and cruelties; and the practical way to test and appreciate the charters is to bear all this in mind, and see how far its different provisions tended to protect the people from these oppressions, which resolves itself into a twofold question: first, how far they were prohibited; and, next, how far they were to be prevented. The mere declaration that they were prohibited came to little in that age. Such declarations had been made in favor of the laws and liberties of the people by every sovereign since the Conquest, and as uniformly disregarded and set at naught. The great point was as to the practical means of preventing these things, which it is manifest could only be done by securing the supremacy of law, and this could only be done by improving and strengthening the judicial constitution of the country, and enabling them to carry out the law. But here, again, was a great difficulty. *Quis custodiet ipsos custodes?* Who should keep the guardians themselves under control? The sheriffs and justices of the king were themselves generally knights or barons, who belonged to the very same class as the oppressors of the people, and who were as ready, for fees or salaries, to practise for the enrichment of the king the same exactions and oppressions which others of the same order practised for their own. Hence, though justices itinerant had been going their circuits since the reign of Henry I., their exactions and oppressions, in levying fines or “amercements,” (which, there is reason to suspect, was the great reason of their appointment), were so intolerable, that it appears the people often dreaded their approach, regarding them as oppressors instead of protectors, and actually remonstrated against their being sent oftener than once in seven years. That the charter did not altogether give satisfaction to the great body of the people in the age in which it was granted, and that even where its terms were satisfactory they were not carried out, is manifest from a chapter in the *Mirror*, entitled, “The Defects of the Great Charter,” which will afford the best possible commentary upon it, and which commences thus: “Seeing how the law of the realm, founded upon forty points of the great charter of liberties, is *damnable misused* by the governors of the land, and by statutes afterwards made contrary to some of the points;

the charter of the ninth of Henry III., so called from the letters-patent prefixed in the name of Edward I. IN-

to show the defects or defaults in these points, I have put this chapter, first of the defects of the Great Charter." And then a variety of points are mentioned, on each of which the comments made will be inserted in the notes to the clause in which it arises. This, it is manifest, will be that contemporaneous exposition which is the best possible commentary on any ancient statute, whence the change, subsequently made, from justices itinerant, who went yearly, to "justices in eyre," who went only septennially (*vide ante*). In such a state of society, it is manifest that, as Guizot points out, the great difficulty was in the guarantees or securities for liberty. As to the law, there was no doubt about it at all. And the very necessity for repeatedly affirming it showed the real difficulty lay in its execution and enforcement. It is to this point, then, principally, as by far the one most practically important, the readers of the charters must attend, in order to judge of their practical worth and value. Mere declarations of that law, no doubt, were in that age not without value; but it must be evident that the great point was, what guarantees or safeguards should be provided. Two points, then, have to be kept in mind in examining the charter: first, what provisions it contained to protect the people not only against the king, but against the barons and other powerful persons; and next, what provisions it contained for practically carrying out these protective enactments. As to the first point, it is remarkable that, as already observed in the chief clause, the celebrated "*nullus liber homo*" clause certainly applies to all freemen, though it contains no practical guarantee, as the commentator in the *Mirror* observes, but rather takes one away, or tries to do so, by making the sovereign undertake not to come upon any freeman, except in due course of law, which, as the great oppressors of the people were too powerful for the ordinary course of law, would secure them from any effective measures of redress, unless, indeed, they actually proceeded to levy war. But then it does not apply to villeins, a large and important class, comprising still the great body of the people, who, as the *Mirror* points out, were not slaves, nor to be regarded or treated as such, or as if they had no personal rights, so that they could be beaten or imprisoned at leisure; yet the charter contains not a word in their favor, and hence, as the *Mirror* says, in a passage at the end, written not long after the final confirmation of the charter by Edward I., "It is an abuse to hold villeins for slaves, and this abuse causeth great destruction of poor people, and is a great offence" (c. v., s. 2); but there is nothing against it in the *Mirror*. And although, in the clause about amercements, all villeins are included, as well as all freemen, and it is said that their amercements must be, saving their "wains" or wagons, that was as much for their lord's benefit as their own, and indeed more so, since they could only use their wagons upon their lord's land, having no property of their own. As regards the great body of the freemen, the common freeholders, no doubt they appear to share in most of the principal clauses in the charter in which they could be included — those relating to personal liberty and rights of property, etc. But the bulk of the charter relates to feudal matters which concerned the barons and knights who held by military tenure, and the only guarantee contained in the first Great Charter consisted, in fact, as Guizot points out, in their own assumption of supreme powers; for it was provided by John's charter that a select body of the most powerful barons might, if they deemed the charter to have been infringed, make war upon the king to compel its observance — *i. e.*, its observance according to their ideas, which was, as Guizot says, the right of civil war; and accordingly it led to civil war, which lasted, more or less, for many years, and in the result it is remarkable that a charter was



SPEXIMUS *Magnam Chartam domini Henrici quondam regis Angliæ patris nostri de libertatibus Angliæ in hæc verba.* Then

obtained in several respects *less* favorable to the people than the *first*, and especially in the omission of the important provision that scutage should only be levied by consent of a common council of the realm, which contained in it the germ of a representative assembly, the effectual guarantee of popular liberty, at all events against the crown. And as the provision for a guarantee of the charter by the barons was omitted, there was no additional guarantee or security afforded by the charter, as now finally settled; and it consisted entirely of declarations of the law, no doubt, in that age, so far as they went, useful and valuable. As to this, indeed, one of our historians, Dr. Henry, observes, that the charter was conceived entirely in the interest of the nobility, and that the only article in favor of the people—the one which applied to the barons the same enactments which they had applied to the king—was inserted at the instance of the king (*Hist. Eng.*, v. 1). This, however, is not a fair representation, for though it may be that the charter was conceived and intended chiefly in the interest of the barons, it did contain provisions which embraced all freemen, and, moreover (what is of infinitely greater importance), it contained the great principles which, though perhaps intended for the benefit of a class, proved the fruitful germs of rights and immunities for the whole body of the nation, and were growing and developing for ages. To trace this progress and development is the great object of the legal history of the subsequent periods. No one will regret the insertion of an admirable passage from Sir J. Mackintosh, in which that great historian sums up in a masterly manner the effect of John's charter: "Many parts of the great charter were pointed against the abuses of the power of the king, as lord paramount, and have lost their importance since the downfall of the system of feuds, which it was their purpose to mitigate. • But it contains a few maxims of just government applicable to all places and times, of which it is scarcely possible to overrate the importance of the first promulgation by the supreme authority of a powerful and renowned nation. Some clauses, though limited in words by feudal relations, yet covered general principles of equity, which were now slowly unfolded, by the example of the charter and their obvious application to the safety and well-being of the whole community. Aids or assistance in money were due from any vassal for the ransom of his lord, for the knighting of his eldest son, and for the marriage of his eldest daughter. But they were often extorted when no such reasons could be urged. Escuage or scutage was a pecuniary compensation for military service, but as the approach of war was an easy pretext, it was liable to become abused. Talliage, an impost assessed on cities and towns, and on freemen who owed no military service, according to an estimate of their income, was in its nature very arbitrary. The barons, in their articles, required a parliamentary assent to the talliaiges of London, and all other towns, as much as to the aids and scutages which fell upon themselves. By the charter itself, however, talliage was omitted, though the liberties of the town were generally asserted. But it contained the memorable provision: 'No scutage or aid shall be raised in our kingdom (except in the above three cases) but by the consent of the general council'—a concession sufficient to declare a principle which could not long remain barren, that the consent of the community is essential to just taxation. By the charter, as confirmed in the next reign, even scutages and aids were reserved for further consideration. But the formidable principle had gone forth, though every species of impost without the consent of parliament was not renounced expressly until the *confirmatio chartarum*, in the 25th Edward I., fourscore years after the grant of the Great Charter. 'To

follows *Magna Charta* nearly in the form of that granted by Henry III. (a).

*Magna Charta* contains fifty-seven chapters, composing a rhapsody of ordinances for the settling or amendment of the law in divers particulars at that time anxiously contended for. The whole is strung together in a disorderly manner, with very little regard to the subject-matter. If we were to judge, from the face of the instrument itself, of the chief design of the barons in ob-

constitute the common council of the kingdom,' says the charter, 'we shall cause the prelates and greater barons to be summoned, and shall direct our sheriffs to summon all who hold of us in chief.' To the upper house of parliament this clause is still applicable. From the lower-house it essentially differs by excluding representation. It presents, however, the first outlines of a parliamentary constitution. The 39th article of the charter is that which forbids arbitrary imprisonment and punishment without lawful trial: 'Let no freeman be imprisoned, etc., otherwise than by the legal judgment of his peers, or by the law of the land.' In this article are clearly contained the *habeas corpus* and the trial by jury, the most effectual securities against oppression which the wisdom of man has hitherto been able to devise. 'We will sell, delay, or deny justice to no one.' No man can carry further the great principle that justice is the great debt of the government to the people, which requires that law be rendered cheap, prompt, and equal. The provision which directs that the supreme civil court shall be stationary instead of following the king's person, is a proof of that regard to the regularity, accessibility, independence, and dignity of public justice which characterizes that venerable monument of English liberty. The language of the Great Charter is simple, brief, general without being abstract, and expressed in terms of authority, not of argument, yet commonly so reasonable as to carry with it the intrinsic evidence of its own fitness. It was understood by the simplest of the unlettered age for whom it was intended. It was remembered by them, and, although they did not perceive the extensive consequences which might be derived from it, their feelings were, however unconsciously, elevated by its generality and grandeur. It was a peculiar advantage that the consequences of its principles were, if we may so speak, only discovered slowly and gradually. It gave out on each occasion only so much of the spirit of liberty and reformation as the circumstances of succeeding generations required, and as their character would safely bear. For almost five centuries it was appealed to as the decisive authority on behalf of the people, though commonly so far only as the necessities of each case demanded. To all mankind it set the first example of the progress of a great people for centuries in blending the tumultuary democracy and haughty nobility with a fluctuating and vaguely united monarchy, so as to form from these discordant materials, the only form of free government which experience would show to be reconcilable with widely extended dominion" (*History of England*, v. 1).

(a) Varying in some respects from the charter of John, as that did from the articles, but no doubt substantially the same. It is to be observed that the author's citations are all from the *Inspeimus* charter of Edward I., which it is necessary to notice, because the arrangement and numbering of the charters vary in every one of them; so that reference to that of Edward I. will not apply to any of those of Henry III. The author's are all to that of Edward I.

taining this charter, we might be inclined to think that their great object was to ascertain the services and burdens arising from tenures; for the first six chapters are wholly confined to that subject, and many others relate incidentally to the same point; the consequence of which is, that many parts of this famous charter have become obsolete, and, to a modern reader, almost unintelligible. Other parts of it, however, are extremely worthy of notice, even at this day; as they, at the time, contributed to confirm, if not establish, certain branches of our juridical constitution; and, what is more important, to lay down certain general principles, which have had an extensive influence on our law in all its branches ever since; as our civil liberty and private rights became thereby better defined, and were considered as settled on the firm basis of parliamentary recognition.

To explain in what manner this was done, it will be proper to state at length the subject of *Magna Charta*; which we shall attempt in an order differing from that in which the text appears, but which will, perhaps, bring the contents of it into a clearer light than the original appears in. We shall first speak of such provisions as are of a more general or miscellaneous nature; then of those which relate to tenures and property; after which will follow the regulations ordained for the administration of justice.

The address and general preamble to the charter are deserving notice, as they show the form in which these solemn acts were usually authenticated: it is addressed in the name of the king, "To all archbishops, bishops, abbots, priors, earls, barons, sheriffs, provosts, officers; and to all bailiffs, and other our faithful subjects, who shall see this present charter, greeting. Know ye, that we, unto the honor of Almighty God, and for the salvation of the souls of our progenitors and successors kings of England, to the advancement of holy church, and amendment of our realm, of our mere and free will,<sup>1</sup> have given and granted<sup>2</sup> to all archbishops, bishops, abbots, priors, earls, barons, and to all freemen of this our realm, these liberties following, to be kept in our kingdom of England forever."

Such is the manner in which the provisions of *Magna*

<sup>1</sup> *Spontanea et bona voluntate nostra.*

<sup>2</sup> *Dedimus et concessimus.*

*Charta* are introduced; after which comes the first chapter, containing a general grant in the following terms: "First, we have granted to God, and by this our present charter have confirmed, for us and our heirs forever, that the church of England shall be free, and shall have all her whole rights and liberties inviolable (a). We have granted also and given to all the *freemen* of our realm, for us and our heirs forever, these liberties under-written, to have and to hold, to them and their heirs, of us and our heirs forever." What these liberties were we shall now inquire.

It was ordained that the city of London shall have all the ancient liberties and customs which it had been used to enjoy; and that all other cities and towns, and the barons of the cinque or other ports, should possess all their liberties and free customs.<sup>1</sup> As many exactions had been made during the reigns of Richard and John for erecting bulwarks, fortresses, bridges, and banks, contrary to law and right, it was declared that<sup>2</sup> no town or free-men should be distrained to make bridges or banks, but only those that were formerly liable to such duty in the reign of Henry II., a period which was often referred to, as an example for correction of enormities, and the due observance of the laws. For the same reason, none were to appropriate to themselves a several right<sup>3</sup> in the banks of rivers, so as to exclude others from a passage there, or from fishing, except such as had that right in the reign of Henry II. (b).<sup>4</sup> All weirs in the Thames and Medway,

(a) The *Mirror*, upon this point, says, "It was necessary to ordain a corporal punishment—namely, to the lay judges, the king's ministers, and others, who judge clerks for mortal crimes to corporal punishments, and do detain their goods after their purgation; and to those secular judges who take upon them cognizance of causes of matrimony and testaments, or other special things" (c. v., s. 2). And, accordingly, subsequent statutes were passed to restrain the lay judges from these latter matters. As to the other point, the cognizance taken by secular judges of the offences of clerks, it is remarkable that it was the very point on which the controversy arose between Henry II. and the Archbishop à Becket; and, according to the *Mirror*, it was an abuse which plainly shows that the Constitutions of Clarendon were not considered laws.

(b) The comment of the *Mirror* upon this is, "The point which forbiddeth that rivers be defended is misused, for many rivers are now appropriated and put in defence which used to be common for fishing in the reign of King Henry I." (c. v., s. 2). Hence it is manifest that the clause was understood to be in *pari materia* with the next mentioned, and which, therefore, our

<sup>1</sup> Mag. Char., ch. 9.

<sup>2</sup> Ibid., ch. 15. <sup>3</sup> Vide Harg. *Tracts*, p. 7, "De defensione riparæ," etc.

<sup>4</sup> Mag. Char., ch. 16.

and all over England, were to be destroyed, except such as were placed on the coast.<sup>1</sup> One standard of weights and measures was established<sup>2</sup> throughout the kingdom.

A provision was made respecting merchant-strangers, which evinces how very early a regard was had to the interests of trade. Before this, it should seem, that merchant-strangers, though in amity, used to be laid under certain prohibitions;<sup>3</sup> for it was now provided,<sup>4</sup> that all merchants, unless they were before publicly prohibited, should have safe and sure conduct in the seven following instances: 1st, to depart out of England; 2dly, to come into England; 3dly, to tarry here; 4thly, to go through England, as well by land as by water; 5thly, to buy and sell; 6thly, without any manner of evil tolls; 7thly, by the old and rightful customs. But this was only while their sovereign was in amity with our nation; for, in time of war, merchant-strangers, being enemies, who were here at the beginning of the war, were to be attached, without harm of their body or goods, till it was made known to the king or his justiciar<sup>5</sup> how our merchants were treated in the enemy's country, and they were to be dealt with accordingly.

These are the provisions of the Great Charter that are not easily reducible to any of the following heads, to

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author couples with it as to the weirs. The intention evidently was to prevent any persons from appropriating to themselves a fishery in any part of the rivers which was common property, and thereby committing a purpresture, as it was called in ancient times, from *pour-pres*, an enclosure. Thus Glanville, in treating of purprestures, says that to erect any obstruction over public waters, across their regular course, was to be considered as such (*vide* Glanville, lib. xiv.). Nor would it of course be less unlawful if in a public navigable river it obstructed the navigation, although the purview of these clauses appears to have been rather the fisheries. Weirs were large dams made across rivers, either for the taking of fish or the conveyance of water to a mill; and the peculiar kind mentioned in the charter by the term *key-dells*, were dams having a loop or net in them, and furnished with wheels and engines for catching fish. They are now called *kettles* or *kettle-nets*, and are still in use on the sea-coast of Kent and Cornwall. The removal of them from the Thames and Medway is directed in several ancient charters beside the present, by John in the first Great Charter, and by Henry III. in his first charter. So they were afterwards prohibited by various statutes (*Stow's Survey*, b. i., c. viii.). Henry III. prohibited weirs in the Thames under the penalty of £10, an enormous sum in those days; and afterwards the penalty was increased to 100 marks, or £66, 13s., 4d., as much as the whole salary of a judge or chancellor in those days, and probably equal at least to £1000 in our own time — perhaps to £2000.

<sup>1</sup> Mag. Char., ch. 23.

<sup>2</sup> 2 Inst., 57.

<sup>5</sup> *Capitali justiciario nostro*.

<sup>2</sup> *Ibid.*, ch. 25.

<sup>4</sup> Mag. Char., ch. 30.

which we are now proceeding. We shall first speak of the regulations relating to tenures. If any earl, or baron, or other person holding of the king in chief by knight-service, died, and at the time of his death his heir was of full age, it was ordained, that he should have his inheritance upon paying the old relief; that is, the heir of an earl was to pay for his earldom £100, the heir of a baron for his barony 100 marks, and the heir of a knight 100 shillings for every knight's fee; and so in proportion (a).<sup>1</sup>

Notwithstanding these reliefs of baronies and earldoms are called the old relief, we have before seen, that in the time of Glanville such reliefs were not fixed by law, but depended on the pleasure of the prince, and therefore must have been a ground of continual discontent; the knight's relief here prescribed is the same as it was in Glanville's time.<sup>2</sup>

In cases where the heir was within age at the death of his ancestor, it was provided,<sup>3</sup> that the lord should not have the ward of him nor of his land before he had taken homage of him. This was in confirmation of the common law stated by Glanville,<sup>4</sup> and was now enacted for better security of heirs against their lords; namely, that before the lord should have benefit of the wardship, he should be bound to two things: 1st, to warrant the land to the heir; 2dly, to acquit him from service, and other duties to be done and paid to all other lords; both which the lord was bound to do, if he had accepted homage of his tenant (b). It was moreover declared, in confirmation likewise of the common law, that when such a ward

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(a) Here, again, how practical the commentator in the *Mirror* is: "This seemeth to be defective, for as the relief of an earldom was to decrease on him who held less; so it seemeth that it was to increase as much, if an earl held more, so as he who held two earldoms, and who held an earldom and a barony, shall pay as an earldom and a barony; and so of other fees, if they be not expressed in the charter, that the fine of one hundred pounds be not on an earldom, for no point increased; and so of other certainties."

(b) Here the *Mirror* observes: "The point is defective (though it be that it is grounded upon law, to bind the lords of fees to warrants by taking of homages, whether they took them of the right heir or not), because it is not expressed who should be guardian of the fees in time of vacancy, and have the issues in the meantime, in cases where the right heirs fly from their lords, and cannot or will not do them homage."

<sup>1</sup> Mag. Char., ch. 2.

<sup>2</sup> *Vide* vol. i., 382.

<sup>3</sup> Mag. Char., ch. 3.

<sup>4</sup> *Vide* vol. i., 378.

came of age, that is, to twenty-one years, he should have his inheritance without relief and without fine (*a*). Notwithstanding such heir within age was made a knight, and so might be judged fit to do the service of a knight himself, it was provided, that though this might discharge his person from ward, yet his land should remain in the custody of his lord till he came of age.<sup>1</sup>

The obligation to restore the inheritance to the heir without destruction or waste, was ascertained more precisely, though in the spirit of the old common law.<sup>2</sup> It was enjoined<sup>3</sup> that the keeper of the land (that is, the guardian of such an heir within age) should only take reasonable issues, and reasonable customs and services, without making destruction and waste of his men, his villains, or his goods. Where a committee of the custody of the king's ward, whether he was the sheriff, as was then usual, or any other person, was guilty of waste or destruction, he was to make recompense; and the land was to be committed to two discreet men of that fee, who were to account for the issues. Likewise, where the king gave or sold the custody, and waste was done, the custody was to be forfeited, and to be committed to two persons of that fee, as before mentioned. It was also directed, that those who had the custody of the land of such an heir<sup>4</sup> should, out of the issues and profits thereof, keep up the houses, parks, warrens, ponds, mills, and other things appertaining to the land, and should deliver to the heir, when he came of full age, all his land, stored

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(*a*) Upon this the *Mirror* observes: "The point is defective, for as much as no difference is expressed between the heirs male and the heirs female; for a woman hath her age when she is fully of fourteen years, and the seven years besides were not ordained first but for males, who, before the age of twenty-one, were not sufficient to bear arms for the defence of the realm. And note that every guardian is chargeable to three things—(1) that he maintain the infant sufficiently; (2) that he maintain his rights and inheritance without waste; (3) that he answer and give satisfaction of the trespasses done by the infant." The defects of the point of disparagement, it is added, appeareth among the statutes of Merton, in which there is a provision connected with the subject. And the default of freebench and widows, in the same manner, on which point it is sufficiently expressed that no woman is dowable if she have not been solemnly espoused at the door of the church or monastery and there endowed. The *Mirror* elsewhere says, that every one might endow his wife, *ad ostium ecclesiæ*, without the consent of the heirs. And so it is in Glanville.

<sup>1</sup> Mag. Char., ch. 3.

<sup>2</sup> Vide vol. i., 368.

<sup>3</sup> Mag. Char., ch. 4.

<sup>4</sup> Ibid., ch. 5.

with ploughs and other implements, at least in as good condition as he received it in. It was provided, that all the above-mentioned regulations should be observed in the custody of archbishoprics, bishoprics, abbeys, priories, churches, and dignities vacant that belonged to the king; with this exception, that the custody of *them* was never to be sold (*a*). As to abbeys not of the king's foundation, it was declared<sup>1</sup> that the patrons of them, if they had the king's charters of advowson, or had an ancient tenure or possession, were to have the custody of them during their vacancy.

In addition to these provisions, it was moreover declared, as it had been before held at the common law, that heirs should be married without disparagement.<sup>2</sup>

Several abuses of purveyance, as well as of tenures, were removed or corrected. No constable of a castle or bailiff<sup>3</sup> was to take corn or cattle of any one who was not

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(*a*) This deserves notice. The terms of the charter are, that the *wardships* shall not be sold, which meant far more than that the mere custody of the sees should not be sold. It is to be observed that the king had the power of terminating the vacancy of a see at any moment, by allowing the free elections to take place, which was expressly stipulated for in the first Great Charter—that of John—and which was implied and recognized in the present (though the express stipulation was omitted) by the general confirmation of all the liberties of the church. The vacancy, therefore, was, after the brief time necessary for a canonical election, simply an act of wrong on the part of the king, and it was done not only for the sake of getting the profits of the temporalities, but of coercing payment of a sum of money for the liberty to come to an election; or from the bishop elect, in order to obtain possession of his temporalities. The contemporary chronicles and the records show that this was so, and that Henry II. held as many as six or seven bishoprics vacant at a time, although he had solemnly engaged to observe the charter of Henry I., which declared that he would not sell or farm the bishoprics, nor take money to allow the entry of successors; and this he defined as the “freedom of the clerics.” “*Quia regnum oppressum erat injustis exactionibus, ego sanctam Dei ecclesiam liberam faciam, ita quod nec vendam nec ad firmam ponam, nec, mortuo archiepiscopo, vel episcopo, vel abbate, aliquid accipiam de domino ecclesiæ vel hominibus ejus donec successor in eam ingrediatur*” (*Charter of Hen. I.*, c. i.). It was this which the present clause was intended to prevent. The mere occupation of the custody of the sees was virtually an usurpation, for they were properly in the custody of the deans and chapters in the case of a bishop, or of the archbishop of the province, which appears from a passage in *Bracton*, where he speaks of the archbishop as having the custody of the see of Rochester, and the king as having the right of custody of the archbishopric in case the archbishop should die (*Bracton*, fol. 400). The mere stipulation that the wardships of vacant sees should not be sold, of itself implies that they had been sold, and shows the real motive for the anxiety to possess the custody of the vacant sees, and for keeping them vacant, in order to have the custody.

<sup>1</sup> Mag. Char., c. 33.

<sup>2</sup> *Ibid.*, c. 6. *Vide* vol. i., 370.

<sup>3</sup> *Ibid.*, c. 19.



an inhabitant of the town where the castle was, but was to pay for the same; and even if the owner was of the same town, it was to be paid for in forty days. No constable of a castle was to distrain a knight to give money for keeping castle-guard, if he would do it in person, or cause it to be performed by some other who was able, and he could show a reasonable excuse for his own omission; if a person liable to castle-guard was in the king's service, he was for the time to be free from castle-guard.<sup>1</sup> No sheriff or bailiff of the king was to take any horses or carts for the king's use but at the old limited price—*i. e.*, says the statute, for a carriage and two horses, 10d. per day; for three horses, 14d. per day: the demesne cart, however, or such as was for the proper and necessary use of any ecclesiastical person, or knight, or any lord, about his demesne lands, was to remain exempt, as had been by the ancient law (a). Again, neither the king nor his bailiffs or officers were to take the wood of any person for the king's castles, or other necessities to be done, but by the license of the owner.<sup>2</sup> These limitations upon services of tenure and upon purveyance, were great benefits to the subject, and so far protected him against these arbitrary claims.

Certain declarations were made as to the nature of tenure, in some instances. The king's prerogative, in cases of ward, was declared in the following manner: If any held of the king in fee-farm,<sup>3</sup> or by socage, or in bur-

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(a) Upon this the comment in the *Mirror* is, "That which is forbidden to constables to take is forbidden to all men, as there is no difference in taking from another against his will, whether it be horses, victuals, merchandise, carriages, or other manner of goods" (c. v., s. 2). The term purveyance is derived from the French, *pourvoir*, to provide, and its legal meaning was providing for the king's household, by his officers, who exercised a prerogative of pre-emption—of buying provisions at a certain rate, to the preference of all others, and even without the owner's consent. It embraced also the power of conveying the horses and carriages of the subject to execute the king's business on the public roads in the conveyance of timber, stores, baggage, etc., upon payment to the owner of a fixed rate. The officers here called constables are the castellans, or keepers of castles; who, in those days, were plunderers, who preyed upon the people. Lord Coke, in commenting on the clause, says, that the constable of a castle had no right to take purveyance at all, though it was a castle for the defence of the realm, as purveyance was only for the royal residence.

<sup>1</sup> Mag. Char., ch. 20.

<sup>2</sup> *Ibid.*, ch. 21.

<sup>3</sup> That is, an inheritance with a rent reserved in fee equal to, or at least a fourth of, that for which the same land had been let to farm.

gage, and held lands of another by knight's service, the king was not, by reason of such fee-farm, socage, or burgage-tenure, to have the custody of the heir, nor of the land holden of the fee of another; nor was he to have the custody of such fee-farm, socage, or burgage, except knight's service was due out of the said fee-farm; nor was the king, by occasion of any petit serjeanty, by a service to pay a knife, an arrow, or the like, to have the custody of the heir, or of any land he held of any other person by knight-service;<sup>1</sup> all which seem to be only more explicit declarations of what the common law was thought to be before.<sup>2</sup>

It was deemed proper to guard against such conclusions as might be founded on the above, or on any other prerogative, in case of baronies escheating to the crown: it was therefore declared, that if any man held of an escheat, as, for instance, of the *honor* (for so it was in such case called) of Wallingford, Nottingham, or any other escheat, being in the king's hands and being a barony, and died, his heir should give no other relief to the king than he did to the baron when it was in his hands; nor should he do any other service to the king than he should have done to the baron. The king was to hold the honor or barony as the baron held it—that is, of such estate, and in such manner and form, as the baron held it; and he was not, by occasion of such barony or escheat, to have any escheat but of lands holden of such barony; nor any wardship of any other lands than what were holden by knight's service of such barony, unless he who held of the barony held also of the king by knight's service *in capite*;<sup>3</sup> from which it appears, that he who held of the king must hold of *the person of the king* and not of any honor, barony, manor, or seignior.<sup>4</sup>

These provisions about tenures were followed by one which was designed for the preservation of tenures in their pristine vigor and importance. We have seen<sup>6</sup> what alteration had gradually taken place in the original strictness with which alienation of land had been restrained; so that, as the law now stood, where the tenure was of a common person, the tenant might in many cases make a feoffment of part thereof, either to hold of himself or

<sup>1</sup> Mag. Char., ch. 27.    <sup>3</sup> Mag. Char., ch. 31.    <sup>5</sup> *Vide* vol. i., 257, 358, 359.

<sup>2</sup> *Vide* vol. i., 244.    <sup>4</sup> 2 Inst., 64.

of the chief lord. A feoffment of the latter kind seemed no way prejudicial to the lord, who still saw the land in possession of a person who was his homager: but when the tenure was reserved to the feoffor, the homage, as far as regarded that portion of the land, passed from the lord to the feoffor. These subinfeudations, as they, in a degree, stripped the mesne lord of his ability to perform his services, were found very prejudicial to the objects of the feudal institution; and therefore the following regulation was made:<sup>1</sup> namely, that for the future no freeman should give or sell any more of his land than so as what remained might be sufficient to answer the services he owed to the lord of the fee.

In what manner this prohibition affected tenants *in capite*, has been somewhat doubted. Some have held that the law never allowed tenants *in capite* to alien without a license from the king, and paying a fine: some, that after this act, land so aliened without license was forfeited to the king. Others again held, that the land, in such case, was not forfeited, but was seized in the name of a distress, and a fine was thereupon paid for the trespass; of which latter opinion is Lord Coke. This question remained undetermined for the space of one hundred years, when it was settled by statute 1 Edward III., c. 12, which declares that the king should not hold such land as forfeit, but that a reasonable fine should be paid in the chancery.

But in the case of common persons who aliened in violation of this prohibition, the law was different; for it is the common opinion, that the act was interpreted in this manner: when a tenant aliened part of his land contrary to this act, the feoffor himself, during his life, could not avoid it; but his heir, after his decease, might avoid it by force of this act; but if the heir had joined with his ancestor in the feoffment, or had confirmed it, neither he nor his heirs could ever avoid it; and if the heir had entered under the sanction of this act, the alienee of part might plead, that the service whereby the land was holden, could be sufficiently provided for out of the residue; upon which issue might be taken. There are many precedents where this provision had been so tried, before the statute

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<sup>1</sup> Mag. Char., ch. 23.

of *quia emptores*, 18 Edward I., which repealed this prohibition, and gave every one free liberty to alien his land in part, or in the whole,<sup>1</sup> with a reservation of the services to the chief lord.

Other means by which the end of tenures was defeated, were alienations in mortmain; for in consequence of these the military service decayed, and lords lost their fruits of tenure. Lands given to religious houses continued in an unchangeable perpetuity, without descent to an heir; and therefore never produced the casualties of wardships, escheats, relief, and the like (*a*). On this account many landholders would insert a clause in the deed of feoffment, *quodd licitum sit donatori rem datam dare, vel vendere cui voluerit, exceptis VIRIS RELIGIOSIS*.<sup>2</sup> It was now endeavored to put a stop to these gifts by a general provision; which was conceived in a way best calculated to meet the devices then made use of to elude the force of restrictions like that just mentioned. It was ordained, that<sup>3</sup> it should not, for the future, be lawful for

Mortmain.

(*a*) This deserves attention, for it throws light upon an important question — the real policy of the legislation against alienation to religious houses, or ecclesiastical bodies; and also upon another subject, as to the interference of the crown in ecclesiastical matters. It is here declared to have been the loss of feudal services. Then it follows, that when lands were thus alienated, it was well known that such services were not claimable, and that it was so is undoubted law. The reason was that the very nature of the tenure on which these bodies held their lands, tenure in “free alms,” or “frankalmoigne,” excluded (to use Littleton’s language) the lords from having any earthly service. Thus the *Mirror* states, that some received their lands to hold for the defence of the realm, and some received them upon no obligation of services as tenants in frankalmoigne (c. ii., s. 28). And Glanville also states that the lands of the bishops, etc., were held in frankalmoigne (lib. 7, c. i.). Hence they owed no military service, and hence the present enactment, and subsequent enactments of a similar nature. It will be observed, however, that this legislation was originally directed not so much against real as against colorable alienations of land, for the mere purpose of evading the military services, or the other odious and oppressive incidents of feudal tenure. The charter points at pretended donations with the intention of taking back the lands again, and with the evident object of receiving them free from feudal obligations. This was considered as a fraud upon the feudal lords; and hence this provision, which, however, affords an indirect proof of what all historians attest, that men very much preferred ecclesiastical lords, so that it was a maxim, “It is better to live under the cross than under the lance.” That the clause was not aimed especially at the church, appears from another clause, that no freeman shall give or sell any more of his lands; but so that of the residue of his lands the lord may have the service due to him which belongeth to his fee (c. xxxii.), whence the subsequent statute of Edward I., *Quia emptores*, to prevent subinfeudations.

<sup>1</sup> 2 Inst., 66. <sup>2</sup> Bract., fol. 13 (? — No such passage can be found there).

<sup>3</sup> Ch. 36.

any one to give his land to a religious house, and to take back again the same land to hold of that house; nor, on the other hand, should it be lawful for a religious house to take lands of any one, and lease them out to the donor. Moreover, if any one was convicted of giving his land to a religious house, the gift was to be void, and the land was to accrue to the lord of the fee. This provision is abridged, and the effect of it declared by the statute of mortmain in the next reign.<sup>1</sup> "Of late," says that act, "it was provided, that religious men should not enter into the fees of any, without license and will of the chief lord of whom such fees be holden immediately;" because if they did, the lord would claim them as forfeit. It is plain from this chapter of *Magna Charta*, particularly from this exposition of it, that gifts of land to religious houses were thereby prohibited generally—that is, even in cases where the religious house did not give the land back to hold of the house, but kept it to themselves in their own hands.<sup>2</sup>

Among other severities attending the condition of tenures, that which related to the dower and marriage of widows was not the least. It seems from the following passages that some impediments were thrown in the way of their just rights, which are not noticed in any document we have hitherto met with. It was declared, that a widow,<sup>3</sup> immediately after the death of her husband, should, without any difficulty, have her *maritagium*<sup>4</sup> and

<sup>1</sup> 7 Edw. I.<sup>2</sup> 2 Inst., 74, 75.<sup>3</sup> Ch. 7.

<sup>4</sup> Lord Coke interprets this passage thus: "Widows are without difficulty to have their marriage (that is, to marry where they will, without any license or assent of their lords) and their inheritance," etc., a construction which has too strong reasons against it. For, first, *maritagium* is generally used by the writers of this period for an estate in *frank-marriage*, and coupled as it here is with *hereditas*, it seems to require that sense. Secondly, this construction is directly contrary to the latter part of this very chapter of *Magna Charta*, where it is expressly declared that widows *shall not* marry without the assent of their lord. Indeed, Lord Coke found it convenient to comment away the meaning of the passage also, which he has done in these words: "That is to be understood where such license of marriage in case of a common person was due by custom, prescription, or special tenure; and this exposition was approved by constant and continual use and experience, *et optimus interpres legum consuetudo*" (2 Inst., 18). The latter position I admit most fully, and beg leave, upon the authority of it, to oppose the testimony of Bracton and Britton to that of our author. It is laid down by both of those writers, as will be shown in its proper place, that this was the general law of the land; though I do not mean to dispute, but that the law in Lord Coke's time might be as he has delivered it in this place. This is one strong

inheritance; and should give nothing for her dower, her marriage, or her inheritance, which her husband and she held the day of her husband's death; by which must be meant some estate in *frank-marriage*, or *conditional fee*. She was, moreover, to continue, if she pleased, in the chief house of her husband, unless it was a castle, for forty days (called her *quarantine*) after his death; within which time her dower, if not assigned before, was to be assigned to her: and when she departed from the castle, a competent house was forthwith to be provided for her, where she might have an honorable residence till the assignment; and in the meantime she was to have reasonable estovers of common. For her dower she was to have assigned to her a third part of all the lands of her husband, which were his during the coverture, unless where it happens that she endowed of less at the church-door. By this description, the widow's dower was enlarged; for in the time of Glanville, it was to be a third of such land only as the husband had at the time of the espousals.<sup>1</sup> It was ordained, that no widow should be distrained to marry, if she chose to live single; provided she would give security not to marry without the license and assent of the king, if she held of the crown; nor without the assent of her lord, if she held of a common person: which last provision was in conformity with the spirit of the common law.<sup>2</sup>

These points concerning tenures, and the incidents of landed property, were ascertained by the Great Charter. The remainder of this ancient piece of legislation is taken up in reforming the modes of redress, and regulating the administration of justice.

Nothing more required mitigation than the rigor with which the king's debts were in those times exacted and levied (*a*). This made it necessary to declare,<sup>3</sup> that neither

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(a) Upon this there was the following in the chapter in the *Mirror*, on the abuses of the law: "It is an abuse that the king's debts lie dormant, and are delayed to be levied by estreats, since the arrears of sheriffs and of others the king's revenues are to be levied without delay upon those who prefer them, if they themselves be not sufficient, and the arrears of the debts of others are to be levied upon their sureties; where the principals are not suf-

<sup>1</sup> *Vide* vol. i., 355.

<sup>2</sup> *Ibid.*, 371.

<sup>3</sup> Ch. 8.

instance, among many others, that our best writers have fallen into the error of canvassing points of ancient law upon principles and ideas wholly modern. [A very just observation.]

the king nor his bailiffs should seize any land or rent for a debt, so long as the goods and chattels were sufficient, and the debtor was ready to satisfy the demand. Further, the pledges of such a debtor, says the statute, shall not be distrained, so long as the principal is of sufficient ability; they are only to be answerable in his default; and they may, if they please, have the lands and rents of the debtor to reimburse themselves whatever they have paid for him.

Where the king's debtor dies, the king is to be preferred in payment of debts by the executor. If, says the charter, any one that holds of the king a lay fee<sup>1</sup> should die, and the sheriff or bailiff shows the letters-patent of the king's summons for a debt due to the king, the sheriff or bailiff may attach and inventory all the goods and chattels of the deceased that are found within the fee, to the value of the debt, by the *view*<sup>2</sup> of lawful men; so that nothing may be removed till the king is satisfied; and after that, the residue is to remain to the executors, to perform the will of the deceased: if nothing is due to the king, then all the chattels are to go to the use of the defunct—that is, to his executors or administrators—saving, says the statute, to his wife and children their reasonable parts; the latter part of which provision does not seem to remove any of the difficulties which were before noticed in the text of Glanville upon the subject of testaments.<sup>3</sup>

A very plain rule of the common law was enforced by a declaration,<sup>4</sup> that no man should be distrained to do more service for a knight's fee, or for any freehold, than was properly due. This provision would not have been necessary, unless the remedy by distress had been lately abused, to compel a compliance with unjust demands. (a)

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sufficient to pay the arrears, the amercements are leviable upon the sureties: and so it is of fines and all other the king's debts, whereby it appeareth that no debt ought to be much behind; in so much as some think that none are chargeable with an old debt, if not of value, or by negligence of the king's officers" (c. v., s. 2, art. xxviii.). By the common law the king could have execution of the body, lands, and goods of the debtor, and distrain for rent due to the debtor. The present charter was found defective upon this point; and hence in the *Articuli Super Cartas* it was provided, "The king will not that over-great distresses be taken for his debts, and if the debtor can find able and convenient surety, until a day before the day limited to the sheriff, within which time a man may procure remedy or agree to the demand, the distress shall be released in the meantime."

(a) There was no more fertile source of oppression upon the people than

<sup>1</sup> Ch. 18. <sup>2</sup> *Per visum legalium hominum*. <sup>3</sup> *Vide* vol. i., 365, 366. <sup>4</sup> Ch. 10.

The most interesting part of this famous charter, as viewed by a modern reader, are the provisions for a better and more regular administration of justice. The effects of these are seen even in the present shape of our judicial polity, to the formation of which they contributed very considerably.

The first of these regulations ordains, that *communia placita non sequantur curiam nostram, sed teneantur in aliquo certo loco*;<sup>1</sup> the sense of which ordinance is, that suits between party and party shall no longer be entertained in the *curia regis* (a) (whose style, during this reign, was properly *placita quæ sequantur regem*), which always followed his person (b),

*Communia placita  
non sequantur curiam  
nostram.*

wrongful distresses for pretended services or duties, and it is obvious that, as it was a grievance which affected every one who had goods of his own, it was of the most general and practical importance. In the *Mirror* it is said, "It is an abuse that we do not prosecute a tortuous distress by way of felony, and that one cannot attain *these robbers* at the king's suit" (c. v., s. 1, art. 80); and it is said with much relish, "that Alfred hanged Hale because he saved Tristram the sheriff from death, who took to the king's use from another his goods against his will, forasmuch as between any such taking from another against his will and robbery there is no difference. And he hanged Arnold because he saved Borgliff, who robbed the people by color of distresses, some by extortion of fines, as if between such extortion and wrongful distresses and robbery there were any difference" (c. v., s. 2, art. 17, 18). And again, in the chapter on distresses; "If any be wrongfully distrained, ye are to distinguish whether it be by those who have power to distrain, or by others. And if by others, then be it an appeal of robbery, whereof Harliff gave a notable judgment; and if by those who may distrain, then they ought to deliver their distress by gages and pledges" (*Ib.*, c. ii., s. 26). "And if the distrainer lead it away, then the cognizance of it belongs to the king's court, and so there is a remedy by replevin. But for the releasing of such distresses, and the hastening of the remedy, Ranulph de Glanville ordained that sheriffs and hundredors should take sureties to prove the complaints, and should deliver the distresses, and should hear and determine the complaints of tortuous distresses." In the same chapter, it is said that an action accrues to people wrongfully distrained, and thus no one can cover his robbery by distress. It is then laid down that "no man can distrain who is not covenanted so to do by law, or by some special deed, by law, as for *damage feasant*, or for duties (or services), or amercement of damages, etc., or by deed or by grant of any service or annuity with power to distrain for it." The whole shows that this clause in the charter is, as Coke shows, quoting Glanville, only in affirmation of the common law.

(a) This, as already shown, is a mistake. The courts of king's bench and exchequer, so soon as they became stationary, recovered that jurisdiction over common pleas which necessarily belonged to the *curia regis*.

(b) The reasons have already been given for believing that there were no *curia regis*, in the sense of a regular judicial tribunal, except it was the exchequer, which, as appears from the *Mirror*, originally instituted as an office of revenue, had begun to receive suits between party and party. The *Mirror*

<sup>1</sup> Ch. 11. Vide vol. i., 278.



and might be held in several different places in the space of one year, to the great inconvenience of suitors, jurors,

says in a passage evidently of great antiquity, "The exchequer was ordained in this way for the pecuniary penalties of baronies and earldoms, and the amercements were 'affeer'd' by the barons of the exchequer, and the escheats sent into the exchequer, though amerced in the king's court" (c. i., s. 3). That might be called the court of a county (c. i., s. 3), which was called *curia regis* in the *Leges Henrici Primi*, or it might be the court of the justices itinerant, or in eyre, mentioned by the *Mirror*. "These writs or commissions (i. e., the king's) were directed sometimes to the justices in eyre, sometimes to persons not named, as to justices and sheriffs" (*Ibid.*). Then, in a subsequent portion of the book — of a later period — mention is made of jurisdiction of judges. "The king, by reason of his dignity, maketh his justices, and appointeth their jurisdiction, and that in divers manners; sometimes certain, as in commissions of assize; sometimes uncertain generally, as in commissions of justices in eyre, and of the chief justices of pleas before the king; and of jurisdiction of the bench, to whom jurisdiction is given to hear and determine fines, the grand assizes, the transaction of pleas, and the rights of the king. Besides, the barons of the exchequer have jurisdiction over revenues and the king's bailiffs, and of rights belonging to the king, and the rights of his crown" (*Ibid.*, s. 3). Sometimes jurisdiction is given to the justices of the bench by removing the pleas out of the counties before the said justices, and sometimes to record pleas holden in mean courts without writs before the said justices of the bench. To the office of chief justice it belongs to redress the tortious judgments and the usage and errors of other justices, and by writ to cause to come before the king the proceedings, in which writs mention is made, "before the king himself" (the style of the king's bench at this day), and the writs not returnable before the king (i. e., in the king's bench) are returnable in chancery (*Ibid.*, s. 3). Thus, therefore, we find mention made of justices in eyre, i. e., who went circuit, and the courts of king's bench, of common pleas, and of exchequer. But this part of the book is certainly as late as the reign of Edward I., as mention is made of the Great Charter. No mention is made of a court called *curia regis*, but it is clear that, since the Conquest, there had been a great court of the king, which had branched out into three courts, common bench, king's bench, and exchequer, and it appears probable that the primitive court was the exchequer. That there was a *curia regis* in the reign of John, there can be no doubt. Thus, in the 2d John, there is an entry of a fine for a writ of summons, "coram rege vel coram justitiariis de banco" at Westminster (*Rot. de Oblatis*, 95), and the *Abbreviatio Placitorum* contains a great number of common pleas of that reign taken in the *curia regis*. That court is described by various terms — "Justitiis domini regis de Westmonasteriis," or "Justitiis de banco." And so in the reign of Henry, prior to the charter, though after the charter the court is called *curia regis*. There is, however, nothing to show that this court was not the exchequer, and a great deal to show that it was. In "Madox's Exchequer," instances are given of common pleas in that court during the reign of John (*Mad. Ex.*, i. 117), and there is an entry in the rolls of that reign of a writ addressed, "*Baronibus de Scaccario a curia regis*." Lord Hale cites a case of a fine levied in the reign of John, "coram ipso rege;" but that leaves the question open, as does another case he cites from the *Abbreviatio*, in which it was held that a suit was held before the king if it was held before his justices in banc (*Hale's Hist. Com. Law*, p. 151). The court here alluded to may have been the exchequer, which was pre-eminently *curia regis*, and in point of fact there are records of fines even as far back as Henry II., "in curia Domini Regis apud Westmonasterium ad

witnesses, and others; but shall be debated in some certain stationary court, where persons concerned may resort at all times for prosecuting and defending their suits (a).

The operation of this provision must have had an immediate influence upon the two great courts of the king; namely, that held before himself, and that which, though a part of it, was called the exchequer; for as both these attended the king wherever he resided, all suits there between parties were interdicted by the words of this law; and the former remained a tribunal for discussion of criminal matters only; the latter for the cognizance of causes concerning the revenue; while common pleas, as

Scaccarium," and this also Mr. Foss states, is an entry constantly to be found in the two reigns following Henry II. Blackstone was of opinion that there was only one court during the Saxon times. After the Conquest, there is mention of more than one, as in the *Leges Henrici Primi*, in which there is mention made of *curia regis*. There is positive proof that there was a court of exchequer as far back as the reign of Henry II., and no proof of any other, and there is positive proof that common pleas were taken in that court. On the whole, therefore, it is plain that there was no court of common pleas before the charter, though there was a court for common pleas. That court followed the king, as the exchequer naturally would, and from that and the other reasons there is strong reason to believe that the court was the exchequer. (*Vide Mem. in Scacc.*, fol. 7, end of Y.-B., Edw. II.). The effect of this clause was, that common pleas could not be taken in that court so long as it remained ambulatory, and therefore a fixed court of common pleas was established, as the exchequer continued ambulatory for some time after the charter. And so of the king's bench. But there is nothing in the charter to prevent common pleas being held in the exchequer or king's bench when they ceased to be ambulatory, and therefore the notion entertained by the author, and so many others, that those courts, by reason of the charter, lost their jurisdiction over common pleas, and had to resort to fictions to regain it, arose out of a complete misconception of the terms of the charter.

(a) Upon this the comment in the *Mirror* is, "It is to be interpreted in this manner, that the people shall not travel to sue in the king's household in the counties as they used to do, but this willeth that the plaintiffs have commissions to sheriffs, to lords of manors, and to justices assigned (*i. e.*, to hold pleas or assizes in the country), so that right be done to the parties in *certain places* where the parties and jurors may be the less travelled." It is added, "Although it be that the charter command that petit assizes be taken in their counties, being made for the ease of jurors, yet it is desired, inasmuch as the justices make the jurors come from the furthest borders of the counties, whereas it were better that the justices rode from hundred to hundred than that the people so travel" (c. v., s. 2). The object was, that the suitor might, at all events in the legal terms, always have a fixed and settled court to resort to, though of course he could also take his cause into the county when the assizes were held there, though in those times they were held with great uncertainty. And that travelling in those times was a serious affair appears even so long after as the *Paston Letters*, temp. Henry VI., where *non venu des Justices* is mentioned as a common reason for not holding an assize (vol. i., l. 6).

they were to be held in some certain place, seemed, naturally enough, to devolve upon the *bench*, or *justitiiarii de banco*, which had been lately established at Westminster, in aid of the two former courts, as we have before seen (a). From this period, the bench, or, as the return was, *coram justitiariis nostris apud Westmonasterium* (to distinguish it from the king's court, which sat at the Tower, and removed with his person), grew into more consideration; and in after times, as it became the sole and proper jurisdiction for *communia placita*, was thence denominated *the common pleas*. In what manner the other two courts recovered a sort of cognizance in common suits between parties, by means of different fictions, will be seen hereafter.

It was endeavored to render the proceeding by assize still more expeditious, by ordaining justices to go a circuit once every year to take assizes, instead of waiting till the justices itinerant came; which latter were perhaps not very regular, or, at least, not wished by the great barons to be very regular in their circuit, as they exercised a jurisdiction of a magnitude and extent that controlled the franchises of lords who had inferior courts. The statute<sup>1</sup> directs, that assizes of *novel disseisin* and of *mortauncestor* shall not be taken but in their shires; whereas we have seen, that writs of assize and *mortauncestor* were returnable in Glanville's time, *coram me vel justitiis meis*,<sup>2</sup> in the *curia regis*, or court before the king; but this was now altered, and they were for the future to be taken in the following manner. The king,

(a) Lord Coke, Hale, and Madox were of opinion with the author that there was a court of common pleas before the charter; and it is clearly implied in the terms of the charter, that common pleas were determined in some court which followed the king. But it by no means follows that this was a court peculiarly for common pleas, and the contrary rather appears from the charter itself as well as from history. For why did the court in which the common pleas were determined follow the king? Because it was a court in nature attached to his person, which would be true of the court of the marshal of the household, the origin of the king's bench (alluded to in the *Mirror* in the passage cited in the previous note to the present clause) or the exchequer. The reasons have been already offered for believing that the exchequer was the original court, one reason being that, with rapacious sovereigns, the revenue was the matter they would first look to, and another and still stronger is the simple fact, that before Magna Charta common pleas were heard in the exchequer.— *Vide Memoranda in Scaccario*, at end of Y.-B., Edw. II., fol. 7.

<sup>1</sup> Ch. 12.

<sup>2</sup> *Vide* vol. i., 266-279.

or in his absence out of the realm, the chief justiciar, was to send justices into every county once a year; and these, together with the knights of the county, were to take the assizes there.<sup>1</sup> Such matters as the justices could not determine on the spot, were to be finished in some other part of the circuit; and such as, on account of their difficulty, they could not determine at all, were to be adjourned before the justices of the bench, and there decided (a). This is said to be the first appointment of *justices of assize*; in consequence of which these writs were ever after made returnable *coram justitiariis nostris ad assisas, cum in partes illas venerint, etc.* Assizes *de ultimâ presentatione*,<sup>2</sup> which hitherto had been taken in the king's courts, that is *coram me vel justitiis meis*, were, for the future, to be heard before the justices of the bench only, and there finally determined; a provision which may be thought to be founded in abundant caution, when it had been before declared, that common pleas, of which this was certainly one, should not follow the king's court.

While order was taken for ascertaining and governing the king's courts, some attention was given to the jurisdiction of the sheriff, where matters of less moment were

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(a) This expression, says Lord Coke, is to be taken largely and beneficially: for they may not only make adjournment before the same justices on their circuit, but also to Westminster or Sergeant's Inn, or to any place out of the circuit (2 *Inst.*). This course affords a curious instance of the way in which valuable enactments were extended by construction. And in Lord Coke's time, as any one who has studied his Reports will be aware, it was the constant practice of the judges in court to reserve cases till they came to town, reserving the judgment. Indeed, the practice appears in some degree to have been kept up to the last century, as Leach's *Crown Cases Reserved* will show. But it appears to have been considered then, not as a legal reservation, but only after judgment, and for the purpose of a recommendation to the crown, in case a point should be resolved for the prisoner, sentence being already passed. This rendered necessary the act for Reservation of Crown Cases (11 and 12 Vict.), which thus, after the lapse of centuries, only carried out Magna Charta.

<sup>1</sup> By the charter of John, the knights associated with the justices were to be four, chosen by the county; and the assizes were to be taken on the day, and at the place of the county court. This delegation of four by the county reminds us of the ancient practice, when judgments were given *per omnes comitatûs probos homines*.\* The latter practice seemed to have been considered as the representative of such ancient tribunal; for in the *Capitula Baronum* they stipulated, that none else (except the jurors and parties) should be summoned to the taking of such assize.† This is probably the origin of the present association in the commission of assize.

<sup>2</sup> Ch. 13.

\* *Vide* vol. i., 383.

† *Vide* Black. Chart., vol. ii., Cap. Bar., 8.

agitated with some solemnity. The county court was to be held<sup>1</sup> only from month to month, that is, not more frequent than once a month; and in counties where the interval of its sitting had been greater, that was still to continue. The sheriff or his bailiff was not to hold his tourn in the hundred more than twice a year, namely, after Easter and Michaelmas, and that in the usual and accustomed place; and the view of frankpledge was to be held by the sheriff at Michaelmas. This last provision was in order to keep up the old constitution so admirably contrived for preserving the peace, and the due order of the decennaries. It was enjoined, that all men's liberties should be maintained as in the reign of Henry II.; and that the sheriff should take no more for his frankpledge than was allowed in that reign. It is cautioned, in this same chapter, that the sheriff should seek no occasion or pretence either for holding his court oftener than is there directed, or taking any unreasonable fees. These injunctions about the sheriff's court were dictated probably by the jealousy that lords of franchises entertained concerning their own courts, with which the sheriff too much interfered.

The practice of courts was considered, and the usage of the common law in some instances was adjusted and confirmed. It was endeavored, by declaring the law more fully on that subject, to prevent all abuse of the *misericordia*, or amercement, which we have had such frequent occasion to mention (a). A freeman, says

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(a) The word "amercement" is derived from the French, "*à merci*," and signifies the pecuniary mulct laid on a person who has offended against the prerogative of the sovereign, and therefore lies at his mercy. From the nature of the thing, and the derivation of the term, being so arbitrary in its character, and French in its etymology, there is reason to believe that it came in after the Conquest, and was an abuse. That the Norman sovereigns were extremely anxious to create the offence of contempt for the prerogative, for which this was supposed to be the penalty, and to take advantage of it, appears plainly from the charter and the laws of Henry I. In his charter he recites, that amercements against those who were "in mercy," had been unmerciful; and this, although the laws of William the Conqueror contain specific provisions as to penalties for various ranks of people — the highest being six Saxon pounds. The charter of Henry ran thus: "*Si quis baronum vel hominum meorum forisfecerit non dabit vadem in misericordia totius pecunie sue sicut faciat tempore patris mei et fratris mei, sed secundum modum forisfacti ita emendabit sicut emendasset retro a tempore patris mei et fratris mei in tempore aliorum antecessorum meorum.*" That is, as it had

<sup>1</sup> Ch. 35.

the statute,<sup>1</sup> shall not be amerced for a small default but after the manner of the default; and for a greater in pro-

been in the times before the Conquest, when fines and penalties were reasonable, whereas, under the Conqueror and his successors, they were arbitrary. Thus Henry II., on an occasion of a pretended contempt by Archbishop Becket, although the archbishop sent four knights to excuse his non-appearance, declared all his possessions forfeited, by way of an amercement, although, by the law of William, the fine could not have been above forty shillings. So the *Mirror* says:—"It is an abuse to assess amercements without the afferment of freemen chosen to it, or to assess them in the absence of those who are to be amerced;" and, again, "it is an abuse to amerce a man by default in an action for outlawry, as loss of land is sufficient punishment" (c. v., s. 1). The Norman sovereigns eagerly availed themselves of any pretence or occasion for declaring a man to be in their mercy, so that he might be amerced *without* mercy; and they thus sought to attach this penalty to any fault or default, or any offence, civil or criminal. Thus, the laws of Henry I. contained a chapter carefully providing what offences should be deemed to be a *miseriçordiâ regis*, and various enactments as to fines for defaults in civil proceedings. Yet, in the *Mirror* it is said, that in defaults in actions the consequence of default was, that there was judgment against the party, or that his lands were seized, until *satisfaction was made*—that is, to the amount of the debt or claim; and this, it is said, was the law until the time of Henry III., and nothing is said as to amercements; whence it is that, in a subsequent passage, no doubt written at a later period, it is said to have been an abuse to amerce those who were sufficiently punished by loss of land. There were, however, cases in which amercements were lawful if reasonable, and the object of the charter was to secure that this should be so. There is a full exposition of the subject in the *Mirror*, in a chapter on amercements, which affords a further comment on this article. A pecuniary pain is called an amercement, which follows real or mixed offences, and is sometimes certain and sometimes uncertain. An amercement is certain sometimes, according to the dignity of the person, as it is of earls and barons, and then the terms of the article as to the *reliefs* of earls and barons, fixed at certain sums by another article, are quoted as if affording the measure of their amercements; and sometimes by a single assize in another place, as of escapes of people imprisoned, in which we are to distinguish of the place, whether the king's prison or another; and the cause, whether mortal or venial; and if mortal, then whether adjudged or not; and if not, the keeper was not assenting to the escape, then the assize of punishment is so many shillings, or more, according to the usage of the country, or of the place or person. Common amercements are taxable by the oath and afferments of the peers (*pares*) of those who fail in *miseriçordia*, according to the constitution of the charter of freedom (*i. e.*, the Great Charter), which willet that a freeman be assessed, when he falleth into an amercement, according to the quality of his offence—a merchant saving to him his merchandise, and a villein his villenage; and these afferors are to be chosen by the assent of the parties, if they will; but the king's officers are to be more grievously amerced for the breach of their duty. Many cases there are where corporal punishments are bought off by fines of money; and such are called ransoms, or redemption from personal pains, whereof some fines are common, as for murders; others for personal trespasses of towns and commonalties; which fines King Edward ordained should be assessed in the presence of the justices. (See the *Mirror*, c. iv., s. 25, 26.) From this it appears that, so late as the time of the charters, the

<sup>1</sup> Ch. 14.

portion thereto, saving to him, in the language of Glanville, his *contenement*, or *countenance* (a): with respect to a merchant, saving to him, in like manner, his merchandise; and to a villein, except he was the king's villein, his wainage (b): from which provisions it appears to have

Saxon law as to compositions for felonies, even in cases of murder, still remained. The comment in the *Mirror* upon this clause of the charter is:—"The point of amercements is measured by justices, sheriffs, bailiffs, stewards, and others, who amerce the people in certain in this manner: Putting such a one to so much for a contempt or other trespass, without a personal trespass, and without the affeerment of the people sworn to it, and without specifying the manner and the quality of the contempt. Again, where affeerors ought to be chosen with the assent of those who are amerced, and in a common place, the lords make the affeerors to come to their houses to affeer the amercements according to their pleasure" (c. v., s. 2). In other chapters, and from Bracton, it appears that the amercements were assessed by the king's justices in their *itineras*, or, as regards those who held of the king, in the exchequer.

(a) Daines Barrington, in his *Observations upon the Statutes*, shows, by several curious quotations, that the word was formerly used as synonymous with entertainment, and that, therefore, this means that a man shall not be so fined, but that he may be able to give his neighbors good entertainment. Lord Coke says, the countenance of a soldier is his armor; the books of a scholar are his countenance; and the like. The meaning is, that by which a man subsists, or which is essential to his maintenance, as, in the instance of a husbandman, his wagon or wain. The sense is illustrated by the rule of the common law, which exempts working-tools, etc., from a distress.

(b) The charter here speaks of villeins, and not merely tenants in villenage, who might be freemen (as the *Mirror* points out), because freemen might hold lands in villenage, and they were already provided for by the previous part of the clause; on the other hand, this clause shows that the villeins—as the *Mirror* also points out in a passage already quoted, *supra*—were not slaves; for if so, they could have nothing of their own. "Of villeins mention is made in the great charter of liberties, where it is said that a villein be not so grievously amerced that his tillage be not secured to him; but the statute maketh no mention of slaves, because they have nothing of their own to lose" (c. ii., s. 128). The *Mirror*, it will be observed, quotes the charter as speaking of the "tillage" of the villeins, whereas the term used is his "wainagium," i. e., wain or wagon. But that was his means of tillage or service, and the effect is the same. Lord Coke says that "wainagium" signifieth a cart or wain, wherewith a villein was to render his service, or to convey the manure of the lord out of the gate of the manor into the great lord's lands, and casting it upon the same and the like (according to Littleton's definition of villeins' tenure, as something vile and base, such as conveying manure). "And it was great reason to save his wainage, for otherwise the wretched creature was to carry it on his back" (2 *Inst.*). But there is here the confusion so often made between villeins and slaves, and the contemporary exposition of the *Mirror* shows that Lord Coke took much too mean a view of the class here alluded to, and the clause in the quotation. In the *Mirror* it is said that all villeins were not slaves, but were "regardant," that is, attached to the manor, and thus are distinguished from slaves, of whom it is said that they could purchase nothing but for their lord's use, and that they may not fly from their lords so long as their lords find them wherewith

been the intention, that these amercements should not be the complete ruin of a man. For the same reason also it was declared, that none of the said amercements should be assessed but by the oaths of honest and lawful men of the vicinage (*a*). Earls and barons, however, were not to be amerced but by their peers (which was done either by the barons of the exchequer, or in the court *coram rege*), in both which the *pares regni* were constitutionally judges,<sup>1</sup> and according to their default;<sup>2</sup> nor was a clerk to be amerced in proportion to his spiritual benefice, but after his lay-tenement, and, in like manner, only according to his default.<sup>3</sup> All these provisions<sup>4</sup> were only to affirm and give a sanction to ancient usages, some of which have been before mentioned: upon this chapter, however, was afterwards framed the writ *de moderatâ misericordiâ*, for giving remedy to a party who was excessively amerced.

The form of trial was intended to be adjusted by the following regulation, though the precise meaning of it has occasioned some doubt (*b*): *Nullus ballivus de cætero*

*to live* (c. ii., s. 28). And elsewhere it is said that it was an abuse to hold villeins as slaves (c. v., s. 1, art. 93); or to say that a villein and a slave are all one (*Ibid.*, art. 72). It is manifest that the condition of the villeins was improving at this time.

(*a*) It may be of interest to point out the manner in which this clause in the charter was practically carried out. Bracton states, in describing the jurisdiction of the itinerant justices as to amercements, that they were to observe this provision of the Great Charter: "De illis qui sunt in misericordia domini Regis, et non sunt amerciati, ad quod videndum qualiter sit quis sit amerciandus. Et secundum quod miles et liber homo non amercia-bitur nisi secundum modum delicti, et salvo contentemento suo. Mercator veri non nisi salvo merchandisa sua. Et villanus autem non nisi salvo wainagio suo, et hoc per iudicium proborum hominum de visneto, qui affi-dabunt simul cum serviente" (lib. iii., c. i., p. 117). It is impossible not to see from this how entirely the observance of the charter depended practically upon the manner in which it was carried out by the judges.

(*b*) It is explained thus in the *Mirror*: "The point which forbiddeth that no bailiff put a freeman to his oath without suit, is to be understood in this manner, that no justice, no minister of the king, nor other officer nor bailiff have power to make a freeman make oath without the king's command, nor receive any plaint without witnesses present, who testify the plaint to be true." Before a man could be put to his law or his oath, which meant the same thing (wager or gager of law being the proceeding by which a defendant waged or gaged, *i. e.*, pledged his oath), the accuser had to produce his *secta*, or suit of followers or witnesses, a practice which became obsolete in the time of Edward III., when the names of John Doe and Richard Roe, as a mere form, make their appearance. Wager of law was a relic of the old Saxon practice of "compurgators," and so Coke said there were to be eleven besides the defendant, because the wager of law was "to countervail a jury."

<sup>1</sup> Bract., fol. 116, b.

<sup>2</sup> *Delicti*.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Vide* vol. i., 209 (note).



*ponat aliquem ad legem manifestam, nec ad juramentum simplici loquelâ suâ, sine testibus fidelibus ad hoc inductis.*<sup>1</sup> Whether this means, that the defendant should not discharge himself by his own oath alone, without the oaths of other persons swearing to their belief of his assertion; or, that no defendant should be put to wage his law, unless the plaintiff supported his *loquela*, or declaration, by credible witnesses; or, as they were afterwards called, *sectatores*; has been a question with some writers. Several passages in Bracton seem to favor the latter opinion; and Fleta explicitly declares this to be the meaning of the provision;<sup>2</sup> if so, most probably the practice of bringing into court the *sectatores* of the plaintiff was established by this clause.<sup>3</sup> The defendant making his law by the oaths of others swearing with him, was an old usage,<sup>4</sup> in criminal cases at least, and as such is mentioned by Glanville; but it is not spoken of at all by that writer as a mode of proof for a defendant in civil suits; though we shall have occasion to mention it frequently in that light upon the authority of Bracton. From the manner in which the latter author speaks of a defence *per legem*, it seems to have been long in use; and from this passage in *Magna Charta*, we must conclude that it had been adopted from criminal to civil actions shortly after the time of Glanville. The *sectatores*, in this sense, constitute another novelty, of which there is no mention in Glanville. When it had become the practice to admit *sectatores*, for so they also were called, to make the defence, it appeared reasonable enough to require, as *Magna Charta* here does, that certain persons should, in like manner, be brought to make out the plaintiff's case. It may be conjectured from the name, that both these sets of persons were originally chosen from the *sectatores* or suitors of court, who were there present, ready to transact such business of the court as might arise.

Of all the provisions made by this charter for the security of the person and property of the subject, none has so much engaged the attention and claimed the reverence of posterity as Chap. 29, which

*Nullus liber homo, etc.*

But the plaintiff was bound to have his witnesses present, and so in the *Mirror* it is said, "It is an abuse that any plaint is received to be heard without sureties present to testify the plaint to be true" (c. v., s. 1).

<sup>1</sup> Ch. 28. <sup>2</sup> Flet., 137. <sup>3</sup> Vide vol. i., 332, in the note. <sup>4</sup> Ibid., 201.

contains a very plain and explicit declaration as to the protection every man might expect from the laws of his country (a). *Nullus liber homo capiatur (b) vel imprisonetur,*

(a) The comment of the *Mirror* upon this is remarkable. "The point where the king granteth that he will not disseisin, nor imprison, nor destroy, but by lawful judgment, *which overthrows the statutes of merchants and other statutes*, is to be interpreted thus, that none be arrested, if not by warrant granted, upon a personal action; for if the action be venial, no imprisonment is justifiable, if not for default of mainpernors. *And so it appeareth that none is imprisonable for debt.* And if any statute be made repugnant to this point, either for the king's debt or for the debt of any other, it is *not to be kept*. That none to be outlawed is to be meant, if not for mortal felony, from which one is saved by the oath of neighbors, *ex officio*, as it is the usage in eyres, and therefore that destroyeth the statutes of outlawry of a man for arrearages of account, and all other like statutes. And that in which it is said that none be exiled or destroyed, is to be interpreted in this manner, that every one have an action to appeal, all persons, all suitors, all assessors, who destroy men against the right course and against the rules of law. On the other part, where the king forbiddeth that none be disseized of his freehold, and it is thus to be understood that one shall recover by assize of novel disseisin every manner of freehold and all manner of possessions, rents of land, or of franchises, whereout one is cast, if it be not by lawful judgment; and these words 'if it be not by lawful judgment' refer to all the words of this statute" (*Mirror*, c. v., s. 2). Now, from this remarkable exposition it appears that the words in the clause, *vel per legem terræ*, were understood to mean, in any way, by due course of law, as by legal warrant, and the like, and that the notion was that every *subsequent* statute, repugnant to the charter, as the statutes allowing imprisonment for debt, was unlawful, in a sense which no one nowadays would uphold, the maxim being that *leges posteriores, leges priores, contrarias abrogant*. The idea, however, in those days obviously was (one which has obtained often in later times) that the charter was more than a mere ordinary statute; that it was, so to speak, the rule of constitutional law, so that no statute at variance with it would be constitutional. And it is very observable how extremely practical is the view taken by the commentator, who evidently regarded the charter with reference to its practical bearing upon the great body of the people in the common affairs of life, and not at all with reference to those political considerations which are usually associated with it. All the commentators think about it is, how it will affect the people in their daily obligations and transactions, as, for instance, with reference to arrest for debt, and the like. It would probably never occur to any one in these days to connect the Great Charter with such a subject at all. Imprisonment for debt has so long been legal, that it never would present itself to us now as coming within the scope of a charter which we usually imagine to have been obtained as a check upon the arbitrary power of the crown, and which, doubtless, was obtained chiefly with that view. But it is evident that, though the crown was the great oppressor of the barons, the people had other oppressors than the officers of the crown, and had other views altogether of the effect or object of the Great Charter, and their views of it were not so enthusiastic as those of its modern admirers.

(b) Upon this the *Mirror* observes, "There lieth no recovery of damages by the assize of novel disseisin;" that is, though a freeman were disseized or dispossessed of any of his rights or liberties, there was only a remedy in *restitution*, not recovery of full damages as compensation, as to which again

*aut disseisietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exulet, aut aliquo modo destruat. Nec (a) super eum ibimus (says the statute in the name of the king), nec super eum mittemus (b) nisi per legale*

there was a subsequent statute, the statute of Merton, and the statute of Gloucester, 16 Edward I. It will be observed in the comments of the *Mirror* upon both these clauses of the first article of the charter how exceedingly *practical* the commentator is. Of what avail (he seems to say) are these admirable general provisions, *if they are not enforced?* And how are they to be enforced? That was indeed the great difficulty of the age; and, as Guizot points out, it was only solved by civil war, until *law* was made supreme.

(a) The article means, in fact, that the king will not make war upon his subject when he can resort to ordinary law. It must not, however, be supposed that this article had anything to do with the rights of war; and it must be borne in mind that rebellion is war against the crown, whence it is that it is called, in the law, levying war against the crown. When rebellion has put a stop to the ordinary course of justice, that is to say, is too strong for the ordinary force by which justice is executed, there is a state of war, in which, by the terms of the charter itself, war is an implied exception to it, and justifies measures of war on the part of the crown against the rebels. For the terms of the article are, that a man shall not be destroyed, save by the law of the land, the ordinary law of the land, which supposes and implies that *it can be put in force*; for, if not, the article would work an absurdity, and legalize anarchy. This was well understood at the time when the charter was granted. The year after the charter of Henry III. was granted, a knight with an armed force seized the king's judges and imprisoned them in his castle, where he bade defiance to the ordinary power of the law. The king levied an armed force, laid siege to the castle, and, when he had taken it, hanged those who were in it, and had defended it against him. No one in that age appears to have considered that this was illegal, as coming within the real spirit and meaning of this clause in Magna Charta. For it would have been idle to attempt to apply the ordinary forms of law against a man who had fortified himself against and bade defiance to its power, and could only be subdued by actual war. (See the contemporary chronicles.)

(b) The author here has this note:—

Lord Coke conceives *ibimus* to signify the process of the court, *coram rege*, and *mittimus* that of any court which derives its authority from a writ sent to it. But these words have a technical sense in the civil law, which fully and more simply explains their meaning here. *IRE bona alicujus dicantur, qui in rerum possessionem a magistratu MITTUNTUR* (*Calv. Lex. Jur. Ire.*). As the former expressions in this chapter apply to the *person* and *freehold*, it seemed natural to add such as would protect the goods and chattels. The trial by jury was never spoken of in these days as *judicium*, much less *judicium parium*. We hear of *verdictum*, *juramentum legalium hominum*, *jurata vicineti*, and the like, all expressive of some sworn truth, or of the person who swore it coming from the vicinage. Whereas the *pares regni* gave judgment, and not upon oath; so did the *seclatores*, in the county and other courts, who were the *pares* to all *liberi homines de comitatu*; and these latter came from the body of the county, and not from the vicinage.\*

Dr. Lingard has suggested a much better illustration of the passage, and one singularly happy. King John, by a patent issued before his charter, engaged not to take or dispossess the barons. "*Nec super eos per vim vel per arma, ibimus,*" that is to say, says Dr. Lingard, "he had been in the

\* *Vide* vol. i., 332.

*judicium parium suorum vel, per legem terræ (a)*; "nor will we take possession of his effects, but by 'the judgment of his peers'" (which, as in another chapter, had in view the *comites et barones*, and not the trial by jury, as has been

habit of going with an armed force or sending an armed force on the lands or against the castles of them he knew or believed to be his enemies, without observing any form of law" (*History of England*, vol. ii., c. 14). (See also Brady's *History of England*, vol. ii., p. 501.) And numerous actual illustrations of this may be afforded, both before and after the charter. Thus John, after the first charter, seized a castle belonging to one of the barons, who had assisted in obtaining it; which was illegal, because the baron was lawfully holding his own in time of peace. It was otherwise in the case above mentioned, note (a).

(a) That is, as regards the barons in pleas of the crown, in which they had privilege of peerage, their fellow barons; but as regarded civil matters, common pleas between subject and subject, the general body of the freeholders were all "*pares*," and they could try, as jurors, any such pleas, whether the justices were barons or not. Indeed, apart from that privilege of peerage, which applied as against the crown, every freeholder was a baron, and, in early times, was so called; and hence the distinction between greater barons and lesser, or knights, as they were called in the age of the charter. Hence, at this day, the phrase, the knights of the shire. In civil cases, therefore, this really meant trial by jury, and so in criminal cases as regards all but barons. Hence in the comment upon the clause in the *Mirror*, it is said, the only remedy, if a man were disseized, was an assize of novel disseisin, in which there was trial by jurors. Hence also in another chapter on cases of disseisin, the trial by jurors is described, as to which, however, it is to be observed, that the jurors were still witnesses, and hence trial by jury was not as it afterwards became, a trial by evidence. Therefore if the jurors knew nothing they could say nothing. Hence in the chapter just referred to it is said: "If the jurors in petit assizes are agreed that one shall give their common verdict for all, and they say they know nothing, the plaintiff shall receive nothing, because he proved not his action; and if they be of divers opinions, they are not, therefore, to be threatened or imprisoned, but are to be secured, and diligently examined. And if two jurors be found to agree among all of them, it sufficeth for him for whom they speak." And it is added, that they are only to be examined as to the point of the action (c. ii., s. 24); likewise it appears that if two of the jury of their own knowledge could speak for the plaintiff, that was sufficient to warrant a verdict for him, provided that then none of the others of their own knowledge would speak against him. This appears also from another passage in the *Mirror*, in which it is said "it is an abuse to compel jurors, witnesses, to say that which they know not, by distress of fine and imprisonment, after their verdict, when they could not say anything; and it is an abuse to examine not the jurors, though they found at least two to agree" (c. v., s. 1); whence again it appears that if two agreed, it might be sufficient, although the jury were to be examined, to see upon what they were agreed, and whether it went to the point of the action. It is quite obvious that at the time of the charter trials were by juries, and that in civil cases all freemen were equals, and the doctrine that a baron could only be tried by his peers, did not apply, for that only applied, as privilege of parliament, to parliamentary peers, or the greater barons, and it applied only to pleas of the crown. It has been seen, under the reign of William, that suits were brought by peers in the county court. The author therefore was in error in what follows.

commonly but erroneously supposed), "or by some other legal process or proceeding adapted by law to the nature of the case." The statute goes on and says, *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam*; whereby the king in his own person declares, that he will neither sell, deny, or delay to any man a due administration of the law (a).

(a) Here again the comment of the *Mirror* is singularly practical, and gives quite a different idea of the charter from that to which we are accustomed. "The point which the king grants to the people, that he will sell no right, nor hurt nor delay justice, is misused by the chancellor, who sells the remedial writs, and calls them writs of grace; and by the chancellor of the exchequer, who denieth acquittances of payments made to the king under 'green wax,' and all those who delay right judgment or other right" (*Mirror*, c. v., s. 2). As regards the first part, also, the *Mirror* elsewhere says, "It is an abuse that the king's officers of the exchequer have jurisdiction of other things than the king's moneys, or fees, or franchises, without an original writ out of the chancery under the white wax" (*Ibid.*, s. 1, art. 27). And again, "It is an abuse that the remedial writs are saleable, and that the king commands his sheriffs that he take sureties to his use for the writ; for by the purchase of these writs he may destroy his enemy wrongfully" (*Ibid.*, art. 18). And then elsewhere it is said, speaking of Alfred's time, "In his time, every plaintiff might have a commission and writ to his sheriff, or to the lord of the fee, or to certain justices assigned upon every wrong which was done." "In his time there was no stay of writs; all remedial writs were grantable as of right" (i. e., *ex debito justitiæ*), by virtue of an oath" (*Ibid.*, c. v.; *Abuses of the Law*, *ibid.*, art. 108). Now, from this it is plain that in the times of the charters it was deemed an abuse that fees should be taken for any writs, and that this was in fact an infraction of the charter in the point here noticed. It is said in an earlier portion of the work, "It was ordained (i. e., in past times), that the king's courts should be open to all plaintiffs, by which they had original writs without delay, as well against the king as against the people," i. e., writs of prohibition or the like directed to officers of the crown, to prevent or restrain their proceedings. The complaint of the commentator is twofold, that all writs are not *ex debito justitiæ* (as writs of summons are), and that all writs were paid for, which is at this moment the case. In the shrewdness or simplicity of those times they seemed to imagine that the provision in the charter precluded the exaction of fees in judicial proceedings. But probably it was rather directed against bribes or fines for the expediting of justice. Of this latter many instances are given in *Madox's History of the Exchequer*, ch. xii. Thus we find that in the 3d Henry III. the men of Portsmouth gave two casks of wine for the king to command the itinerant justices to hold pleas of that town, according to their charter; and in the 16th John, a suitor paid a fine of *fox dogs* for a writ to remove his cause into the court of the king. In some cases the parties offered a portion of what they were to recover to the crown; and thus *Madox* states that in the 1st Henry III. a suitor was fined half of her debt to recover it from her debtor. Fines also for delaying of pleas, judgments, etc., were numerous; and thus the same authority records that in the reign of Henry II. the men of Southwark paid a fine to respite their complaint against the city, and the suitors paid fines for the adjournment of their cases into the exchequer. Thus it should seem that the real scope of the clause was not fees, but fines—that is, not fixed moderate payments for fair purposes of revenue,

Among the regulations for the administration of justice must be mentioned that respecting the writ of *præcipe in capite*; *breve quod dicitur*, says the charter, *Præcipe in capite de cætero non fiat alicui de aliqua libero tenemento, unde liber homo perdot curiam suam* (a). We have seen, that, in Glanville's time,<sup>1</sup> the regular way was, that for land held of a private lord suits should be commenced in the lord's court, and that only writs concerning land held *in capite* should be returnable in the king's court. The course seems to have been sometimes not adhered to, and a writ of *Præcipe* for lands held of a private lord used to be brought sometimes in the *curia regis*, as if the land was held *in capite*. It was to prevent this prejudice to the lord's court, that the above provision was made; and since that, all writs of right of land held of any other than the king, have been invariably brought in the lord's court, though they might afterwards be removed by *pone*. That this provision was aimed only at writs of right, and not at other *præcipes*, is expressly declared by Bracton.<sup>2</sup>

These were the regulations ordained for the settlement

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but arbitrary exactions and extortions, either for the provision or execution of justice. The words, "to none will we sell," were meant to abolish the fines paid for procuring of right; "to none will we deny," meant the stopping of suits or proceedings and the denial of writs; "to none will we delay," meant the delays caused by the counter-fines of defendants (who would sometimes outdo the plaintiffs), or by the will of the prince. The statute, says Madox, so far effected its object that fines for law proceedings became more moderate, and the evils alluded to fell into disuse. But the *Mirror* says, speaking of the time of Edward I., "It is an abuse that justice is delayed in the king's court more than elsewhere" (c. v., s. 1). "And it is an abuse that remedial writs are saleable;" — so that, half a century after the charter, this clause of it had proved nugatory.

(a) The comment of the *Mirror* is, "The clause, of the *præcipe*, is not holden in that they do it without writs of possession of farms every day, so that the lords lose the cognizance of their fees and the advantage of their courts" (*Mirror*, c. v., s. 2). The word *præcipe* is the initial word in a writ of the king's court, as a writ of right; and Bracton says the clause only refers to writs of right (*Bracton*, fol. 281). The clause seems to have been aimed at the practice of serving writs in the king's court, when the suit should have been brought in the court of the lord of whom the lands were held, whereby he lost the profits. It will be observed that the words are "*præcipe de capite*," which latter words, added in the third chapter of Henry III., implied that the land was held of the king in chief, or otherwise the suit should first be brought in the court of the lord of whom the land was held, and hence Lord Coke suggests that to carry out the clause there ought to have been an oath required of the truth of this recital in the writ. The object was to prevent injuries to the lords under color of the writ falsely issued.

<sup>1</sup> *Vide* vol. i., 379.

<sup>2</sup> *Bract*, fol. 281.

and improvement of our law relative to property, and the administration of civil justice. Some few provisions were made regarding our criminal law, though not of the same magnitude with the former.

As the distribution of justice, particularly that which concerns the lives and persons of individuals, should be in the hands of persons not only of discretion and judgment, but also well versed in the law, it was thought proper to ordain,<sup>1</sup> that no sheriff, constable, coroner, or other bailiff of the king, should hold pleas of the crown (a): it is held, that<sup>2</sup> by this provision, the au-

(a) The comment of the *Mirror* upon this is, "The chapter which forbiddeth sheriffs, coroners, or bailiffs to hold pleas of the crown, seemeth not needful, for appeals of felony are not here to be brought before coroners, and the exigents and judgments pronounced; and, therefore, this point had need to have had more words to have expressed the meaning of it" (*Mirror*, c. v.). This, no doubt, means that the coroner did not try criminals as sheriffs did. Our author seems to have supposed that the article did not apply to pleas triable before the sheriff, as though a plea of the crown could not be tried before the sheriff; but the sheriff was the king's criminal judge, and, therefore, Glanville includes theft among pleas of the crown, though, as his book was confined to the *curia regis*, he did not enter further into the practice of the various counties differing in their courts. The object of this clause in the charter was to secure that men should be tried before regular judges, the king's justices sent down into the counties, who, being men more devoted to the law as a study and profession, were naturally more relied upon. This clause, therefore, marks an era in the history of the law, so far as regards the criminal judicature, as other clauses do with reference to the civil judicature. That many grievous mistakes were made in the administration of criminal justice, through ignorance of the law, in these days, is clear from other passages in the *Mirror*. There, among the "abuses" of the law, mentioned in the chapter under that head, are these:—"It is an abuse that a man who hath done manslaughter of necessity, or with the peace, or not feloniously, is detained and kept in prison until he hath purchased the king's charter of pardon, as (*i. e.*, as it is) for his chance. It is an abuse to hold the movable goods of fugitives from justice, forfeited before they be attainted of the felony, by outlawry or otherwise. It is an abuse to outlaw a man before it hath been confirmed by oaths of neighbors. It is an abuse to suffer a man attainted of felony to be an approver, and to have a voice as a true man. It is an abuse that others reverse the appeals of approvers, than coroners, and that they are suffered to appeal offender than once, or falsely. It is an abuse to bring the appeal elsewhere than before the coroner of the county, and that appeareth by the writ of appeal as a writ grounded upon error" (so that the other passage, the comment on the charter, seems an error). "It is an abuse to determine the appeals of felony by ordinary judges, suitors," *i. e.*, the freeholders in the county court, where the sheriff sat as judge in crown cases, so that this seems just the evil intended to be remedied by the charter. "It is an abuse to make a man to answer to the king's suit when he is not indicted or appealed. It is an abuse to imprison any other than a man indicted or appealed, without a special warrant. It is an abuse that justices and their officers who kill people by false judgment,

<sup>1</sup> Ch. 17.<sup>2</sup> 2 Inst., 32.

thority of the sheriff to hear and determine theft and other felonies was entirely taken away. But this altera-

are not destroyed like other murderers, which, it is said, King Alfred caused to be done, who caused forty-four justices, in one year, to be hanged as murderers for their false judgment. It is an abuse that a man be accused of life and murder without suit or indictment. It is an abuse that the justices show not the indictment to those who are indicted, if they require the same. It is an abuse that rape is a mortal offence." It is manifest that there was trial by jury; for it is said, "it is an abuse to compel jurors, witnesses, to say that which they knew not. It is an abuse that one examined the jurors, though they find at least two to agree." It is also said that "it is an abuse to adjudge a man to death, by suitors, if not in cases so known that there need no answer." Yet it is also said, "it is an abuse that the justices drive a true man to be tried by his country when he preferreth to defend himself against the approver by battle." Whence it appears that trial by jury was not yet thoroughly understood, as we have it, as a trial by evidence, but merely from personal knowledge; so that, if the jurors did not happen to know anything of the case, they were in great perplexity. And the course taken when they were in doubt was, it is evident, to "examine" them and see if they could be brought to agree. This opened a door for influence on the part of the judge, and hence one of the abuses complained of. In another place it is said that in doubtful cases we ought to save rather than to condemn; but a case is put of a judge who in such a case condemned a man. It will be observed, it is said to be an abuse that a man should be judged to death by suitors; now these were the suitors at the county court, where the sheriff sat as criminal judge, and that illustrates the meaning of the above clause in the charter, and the mischief it was intended to meet. From other parts of the *Mirror* it is apparent that there were grievous mischiefs through ignorance of those who tried criminal cases. Thus, in the chapter on murder, it is said, "ye are to distinguish from other manslaughterers, as of jurors, justices, witnesses," etc. "Judges judge men falsely to death wittingly, and sometimes out of ignorance; in the first case they are murderers, and are to be hanged by judgment; and in the second place, ye are to distinguish, for one manner of ignorance excuseth, and another kind that doth not excuse, and note that ignorance itself is no offence. The judge doth not offend so much that he doth not know the law, but in foolishly undertaking upon him to judge foolishly or falsely. And that which is said of justices is to be intended also of jurors, and of witnesses in cases notorious" (c. ii., s. 16). It is to be observed that the sheriffs would come under the general term justices, and indeed, in the time before the charter, the sheriff often was one of the justices of the king. With respect to the word "constables," it must not be supposed that the ordinary officers of the peace are intended, but the constables of castles, of which there were, in the time of Henry, upwards of a thousand. The whole country was covered with these fortresses, which, as described by the chronicles, were too often "dens of thieves," the owners and their officers being generally plunderers of the people. The castles were always on manors, and Guizot points out how, in the Middle Ages, the "villas" had changed into castles. The lords of manors had criminal and civil jurisdiction within their manors, and hence the constables held trials of pleas of the crown, that is, of criminal charges, within their manors, as the sheriffs did within the counties. And so of the stewards or bailiffs in manors, not castles. These officers were all the more dangerous, because as their fortresses were very secure places, and so convenient for prisons, they often had the keeping of prisoners charged with crimes in the counties. Hence they possessed powers very liable to be abused, and which were



tion could not have been made by force of this statute alone; it must be remembered, that, in the time of Glanville, theft was not among the *placita coronæ* (a), but was tried by the sheriff. In the time of Bracton, we find it was reckoned among the *placita coronæ*; and this change of its nature was necessary, before the present clause of *Magna Charta* could have the effect of removing it from the jurisdiction of the sheriff, as a plea of the crown. Whether this new denomination took place before or after the passing of *Magna Charta*, or in what period between the times of Glanville and Bracton, it is not easy or necessary to determine. This provision has been construed to apply only to hearing and determining; and therefore it was held, that the sheriff's power to take indictments of felonies and misdemeanors, as well as the coroner's to take appeals, still remained unimpeached; and in truth both were exercised for many years after, till a particular statute<sup>1</sup> was made to abolish the last remains of the criminal jurisdiction belonging to these ancient common-law judges.

It was declared, that a woman should not bring any appeal of death, except of the death of her husband, in the following words:<sup>2</sup> "No one shall be taken or imprisoned on account of the appeal of a woman brought for the death of a man, except for the death of her husband;" which is one, among many other articles of this statute, that is only a confirmation of the common law.<sup>3</sup>

The writ *de odio et atia* was rendered more attainable

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abused to purposes of horrible oppression. Hence, long after the charter, and when, after the justices of the peace were established, these functionaries got themselves put into the commission of the peace, the abuses they committed were thus described in a statute (5 Henry IV., c. 10), by which it was recited that constables of castles by color of their commissions take people, to whom they bear ill will, and imprison them within their castles, till they have made fine and ransom with the constables for their deliverance. It may be imagined how desirable it was to deprive this class of functionaries of the dangerous power of trying their prisoners; and hence the necessity for the present enactment, one of the most important to the people of any to be found in the charter.

(a) This is a mistake. It was a plea of the crown, though so tried.

<sup>1</sup> 1 Edw. IV., c. 2.

<sup>2</sup> Ch. 34.

<sup>3</sup> Lord Coke, in his Commentary on this chapter, has laid it down that a woman before this statute might have an appeal of the death of any of her ancestors; but this opinion seems to have no foundation, and what has been laid before the reader in another place shows the law to have been quite otherwise. *Vide* vol. i., 461. 2 Inst., 68.

than it had hitherto been. It was ordained that this writ, in future, should issue *gratis*, and should never be denied<sup>1</sup> (a). This is the first mention of this writ by name, though it has been alluded to in a former part of this history.<sup>2</sup> This writ was one of the great securities of personal liberty in those days. It was a rule, that a person committed to custody on a charge of homicide, should not be bailed by any other authority than that of the king's writ; but to relieve a person from the misfortune of lying in prison till the coming of the justices in eyre, this writ used to be directed to the sheriff, commanding him to make *inquisition*, by the oaths of lawful men, whether the party in prison was charged through malice, *utrùm rettatus sit odio et atia*; and if it was found that he was accused *odio et atia*, and that he was not guilty, or that he did the fact *se defendendo*, or *per infortunium*, yet the sheriff, by this writ, had no authority to bail him; but the party was then to sue a writ of *tradas in ballium*, directed to the sheriff; whereby he was commanded, that, if the prisoner found twelve good and lawful men of the county who would be mainpernors for him, then he should deliver him in bail to those twelve. The writ, or inquisition *de odio et atia*, had a clause in it, *nisi indictatus vel appellatus fuerit coram iustitiariis ultimo itinerantibus*; so that the inquisition was not in such case to be taken.<sup>3</sup> We see how important it was, that this writ should be attainable with as little expense and trouble as possible, to avoid the oppression of malicious prosecutors.

(a) Glanville says, that persons accused of murder were not discharged upon pledges (or bail), unless by the king's particular prerogative (lib. xiv., c. 2), which is supposed to allude to this writ. The comment of the *Mirror* upon this clause is, that the provision that it be granted freely, ought to extend to all remedial writs, and that the writ ought to extend, not only to felonies of murder, but to *all* felonies, and not only in appeals, but in indictments (c. v., s. 2); and elsewhere it is said to be an abuse that the writ takes place only in cases of murder; but it is also said that it is an abuse that it lieth for indictments — *i. e.*, after indictment found; and, it is added, that it is an abuse that appellees or inditees of mortal crime are got out of prison by bail; and again, it is said to be an abuse to let to bail a man indicted of a mortal offence by pledges (*Ibid.*, 17). The effect of all this appears to be, that the remedy, by *judicial inquiry*, ought to be available in any case, before indictment found, where the charge was found groundless on such inquiry; but that, *without* it, not in *any*; nor after indictment found; and that is, in effect, what the law really is.

<sup>1</sup> Ch. 26.

<sup>2</sup> *Vide* vol. i., 460.

<sup>3</sup> Bract., 122, b. 123, a, b.

As to the forfeiture and escheat of lands for felony, it was declared, that the king would not hold them for more than a year and a day, and then they should go to the lords of the fee;<sup>1</sup> which was nothing more than the language of the law before.<sup>2</sup>

It was declared, that escuage should be taken<sup>3</sup> as it was wont in the reign of Henry II. This is the last provision of this famous charter; and is followed by some general declarations and renunciations dictated by the solemnity of the occasion. The liberties and free customs belonging to all persons, spiritual or temporal, are saved; and the king declares, that "all the customs and liberties aforesaid, which we have granted to be holden within this our realm, as much as appertaineth to us and our heirs, we shall observe; and all men of this our realm, as well spiritual as temporal, as much as in them is, shall observe the same against all persons in likewise." For this grant of their liberties, the barons, bishops, knights, freeholders, and other subjects, granted a subsidy; and then, says the king, "we have granted to them, for us and our heirs, that neither we nor our heirs shall attempt to do anything whereby the liberties contained in this charter may be infringed and broken. And if anything should be done by any one contrary thereto, it shall be held of no force or effect" (a).

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(a) It is very remarkable that upon this clause there is no commentary in the *Mirror*, which supports the impression that the writer belonged to the body of the people, and therefore attached more importance to those provisions which appear to relate to them than to those which affected the barons and knights. The history, however, of this clause is extremely interesting, on account of the important bearing of the subject upon the rise of our representative institutions. It has already been seen, in the comments on the charter of Henry II., that "scutage" was an incident of military tenure, and a kind of composition for non-attendance in war. This clause simply provides that it should be assessed at a reasonable amount, as under the charter of Henry II. But the clause in the charter of John contained the important condition, that it should only be imposed by the common council of the realm. This, however, was left out of the present charter; but in the charter of Edward I. it was again inserted, and this was followed by various statutes, which declared that the king should take no talliages, scutages, or aids, but by the consent of the common council of the realm, which, being for this purpose, made representative—in effect created a parliament. Scutage thus became virtually merged in subsidies, and the last scutage levied was in the reign of Edward II. Thus, as Blackstone observes, the levying of scutage by the consent of the council of the realm became the groundwork of all the fixed taxation of the kingdom—first for

<sup>1</sup> Ch. 22.<sup>2</sup> *Vide* vol. i., 374.<sup>3</sup> Ch. 37.

To these solemn and repeated declarations respecting the sanctity of this charter of liberties, is added *hiis testibus*, containing a list of the greatest names in the kingdom: for as in these times no grant of franchises, privileges, lands, or inheritances passed from the king but by the advice of his council, expressed under *hiis testibus*, this was thereby rendered an act of the king, attended with every formality that could possibly render it binding. In this consideration of it, it is properly *charta*, or a charter; though in that form it received likewise the authority of parliament. To the end of the charter, as it stands in the statute-book, is subjoined the confirmation of it before mentioned to have been made in the 25th year of Edward I.

The *Charta de Foresta* is likewise taken from the roll of 25 Edward I., and has a confirmation of that date prefixed to it, similar to that prefixed to *Charta de Foresta*. *Magna Charta*. This charter, though of infinite importance at the time it was made, contains in it nothing interesting to a modern lawyer, any further than as it gives some specimen of the nature of the institution of Forest Law, and the burdens thereby brought on the subject. In this light, the Charter of the Forest is a curious remain of ancient legislation. It contains sixteen chapters.

The first chapter of this charter directed that all forests which had been afforested by Henry II. should be viewed by good and lawful men; and if it was proved that he had any woods, except the demesne, turned into forest, to the prejudice of the owner's wood, it was to be forthwith disafforested; but the royal woods that had been made forest by that king, were still to remain, with a saving of the common of herbage, and other things which any one was before accustomed to have.<sup>1</sup> This was the provision in relation to the forests made by Henry II. As to those made by the kings Richard and John, they, unless they were in the king's own demesnes, were to be forthwith disafforested.<sup>2</sup> The charter directed, that all archbishops, bishops, abbots, priors, earls, barons, knights,

subsidies, and then for the land-tax, its modern substitute. And the development of the great principle just asserted as to scutage led to the constitution of our parliament.

<sup>1</sup> Ch. 1.

<sup>2</sup> Ibid., 3.

and free tenants, having woods in forests, should have them as they enjoyed them at the first coronation of Henry II., and should be quit of all purprestures, wastes, and assarts, made therein before the second year of Henry III.<sup>1</sup> Thus far were limits fixed to the extent of forests; and after these provisions a clause is added, by which all offences therein were pardoned.

In point of regulation it was ordained, that regarders, or rangers, should go through the forests to make their regard or range, as was the usage before the first coronation of Henry II.<sup>2</sup> The inquisition, or view for the *lawing* or *expeditation* of dogs, was to be had when the range was made, that is, from three years to three years; and then it was to be done by the view and testimony of lawful men, and not otherwise. A person whose dog was found not *lawed*, was to pay three shillings. No ox was to be taken for *lawing*, as had been before customary; but the old law in this point of expeditation was to be observed, namely, that three claws of the fore-foot should be cut off by the skin: and, after all, this expeditation was to be performed only in such places where it had been customary before the first coronation of Henry II.<sup>3</sup> It was ordained that no forester, or bedel, should make scotal, or gather gerbe, oats, or any corn<sup>4</sup> whatever, nor any lambs, or pigs; nor make any gathering at all, but upon the view and oath of twelve rangers, when they were making their range. Such a number of foresters was to be assigned, as should be thought necessary for keeping the forest.<sup>5</sup> It was permitted to every freeman to agist his own wood, and to take his pannage within the king's forest; and for that purpose he might freely drive his swine through the king's demesne woods; and if they should lie one night in the forest, it should be no pretence for exacting, on that account, anything from the owner.<sup>6</sup> Besides the above use of their own woods, freemen were permitted to make in their woods, land, or water within the forest, mills, springs, pools, marlpits, dikes, or arable grounds, so as they did not enclose such arable ground, nor cause a nuisance to any of their neighbors:<sup>7</sup> they might also have eyries of hawks, sparrow-hawks, falcons, eagles, and herons, as likewise the honey found in their own woods.<sup>8</sup>

<sup>1</sup> Ch. 4.<sup>3</sup> Ibid., 6.<sup>6</sup> Ch. 7.<sup>7</sup> Ibid., 12.<sup>2</sup> Ibid., 5.<sup>4</sup> *Bladum*.<sup>6</sup> Ibid., 9.<sup>8</sup> Ibid., 13.

Thus was a degree of relaxation given to the rigorous ordinances of William the Conqueror, who had appropriated the lands of others to the purpose of making them forest; the owners thereof were now admitted into a sort of partial enjoyment of their own property.

It was permitted that any archbishop, bishop, earl, or baron, coming to the king, at his command, and passing through the forest, might take and kill one or two of the king's deer, by view of the forester if he was present; if not, then he might do it upon the blowing of a horn, that it might not look like a theft. The same might be done when they returned.<sup>1</sup> No forester, except such as was a forester in fee, paying a farm for his bailiwick, was to take any chiminage, as it was called, or toll for passing through the forest; but a forester in fee, as aforesaid, might take one penny every half-year for a cart, and a halfpenny for a horse bearing a burden; and that only of such as came through by license to buy bushes, timber, bark, and coal, to sell again. Those who carried brush, bark, and coal upon their backs were to pay no chiminage, though it was for sale, except they took it within the king's demesnes.<sup>2</sup>

Part of this charter consisted of matters relating to the judicature of the forest. It was ordained, that persons dwelling out of the forest should not be obliged to appear before the justices of the forest, upon the common or general summons; but only when they were impleaded there, or were pledges for others who were attached for the forest.<sup>3</sup> *Swainmotes* (which were the courts next below those of the justices of the forest) were to be held only three times in the year; that is, the first fifteen days before *Michaelmas*, when the agistors came together to take agistment in the demesne woods; the second was to be about the feast of *St. Martin*, when the agistors were to receive pannage: and to these two swainmotes were to come the foresters, verderors, and agistors, and no others. The third swainmote was to be held fifteen days before *St. John Baptist*; and this was *pro fœnatione bestiarum*; to this were to come the verderors, and foresters, and no others; and the attendance of such persons might be compelled by distress. It was

<sup>1</sup> Ch. 11.<sup>2</sup> Ibid., 14.<sup>3</sup> Ibid., 2.

moreover directed, that every forty days throughout the year, the foresters and verderors should meet to see the attachments of the forest, *tam de viridi quàm de venatione*, as well for vert as venison, by the presentment of the same foresters.

Swainmotes were to be kept in those counties only where they had used to be held.<sup>1</sup> Further, no constable, castellan, or other, was to hold plea of the forest, whether of vert or venison (which was a prohibition similar to and founded on a like policy with one in *Magna Charta* about theft); but every forester in fee was to attach pleas of the forest, as well for vert as venison, and present them to the verderors of provinces; and after they had been enrolled and sealed with the seal of the verderors they were to be presented to the chief forester, or, as he was afterwards called, the chief justice of the forest, when he came into those parts to hold the pleas of the forest, and were to be determined before him.<sup>2</sup>

Punishments.

The punishments for breach of the forest law were greatly mitigated. It was ordained that no man should thenceforth lose either life or limb<sup>3</sup> for *hunting deer*; but if a man was convicted of taking venison he was to make a grievous fine; and if he had nothing to pay he was to be imprisoned a year and a day and then discharged upon pledges, which, if he could not find, he was to abjure the realm.<sup>4</sup> Such were the tender mercies of the forest laws. Besides such qualifications of this rigorous system, it was ordained that those who, between the time of Henry II. and this king's coronation, had been outlawed for the forest only, should be in the king's peace, without any hindrance or danger, so as they found good pledges that they would not again trespass within the forest.<sup>5</sup>

These were the regulations made by the Charter of the Forest, which concludes with a saving clause in favor of the liberties and free customs claimed by any one, as well within the forest as without, in warrens and other places, which they enjoyed before that time. To the whole is subjoined a like confirmation as that to *Magna Charta*, in the 25th year of Edward I.

Many copies of the Great Charter and Charter of the Forest were put under the great seal and sent to the arch-

<sup>1</sup> Ch. 8.

<sup>2</sup> Ibid., 16.

<sup>3</sup> *Pro venatione*.

<sup>4</sup> Ch. 10.

<sup>5</sup> Ibid., 15.

bishops, bishops, and other dignified ecclesiastics, to be safely kept, one of which remained in Lambeth Palace till a very late period.<sup>1</sup> It is said, however, that Henry, when he came of age, cancelled, in a solemn manner, both those charters at a great council held at Oxford, and that he did this by the advice of Hubert de Burgh, chief justiciary, who, of all the temporal lords, was the first witness to both the charters. Notwithstanding this, we find in the 38th year of this reign, A. D. 1254, a solemn assembly was held in the great hall at Westminster, in the presence of the king, when the archbishop of Canterbury and the other bishops, apparelled in their pontificals, with tapers burning, denounced a sentence of ex-  
Charters confirmed.  
communication against the breakers of the liberties of the church and of the realm, and particularly those contained in the Great Charter and Charter of the Forest, and not only against those who broke them, but also against those who made statutes contrary thereto, or who should *observe* them when made, or presume to pass any judgment against them; all which persons were to be considered as *ipso facto* excommunicated; and if any ignorantly offended therein, and, being admonished, did not reform within fifteen days and make satisfaction to the ordinary, he was to be involved in that sentence.<sup>2</sup> We shall see, in the succeeding reigns, how often these two charters were solemnly recognized and confirmed both by the king and parliament.

The first public act which presents itself in the statute-book after the two charters, is the *Statutum Hiberniæ de cohæredibus*, 14 Henry III., which, Statutum Hiberniæ. from a consideration of the matter and manner of it, has been pronounced not to be a statute.<sup>3</sup> In the form of it, it appears to be an instruction given by the king to his justices in Ireland, directing them how to proceed in a certain point, where they entertained a doubt. It seems, the justices itinerant in that country had a doubt, when land descended to sisters, whether the younger sisters ought to hold of the eldest, and do homage to her for their several portions, or of the chief lord, and do homage to him; and certain knights had been sent over to know

<sup>1</sup> It is mentioned by Bishop Burnet to have been among the papers of Archbishop Laud.

<sup>2</sup> *Vide Pickering's Statutes.* <sup>3</sup> *Old. Abridg., Tit. Homage, vide vol. ii., 99.*



what the practice was in England in such a case. The following is stated as the usage of England at that time, agreeing with what is laid down both by Glanville and Bracton.<sup>1</sup> If any one holding *in capite* died, leaving daughters co-heiresses, the king had always received homage of all the daughters, and every one of them held *in capite* of the king; and accordingly, if they were within age, the king had ward and marriage of every one. And again, if the deceased was tenant to any other lord, and the sisters were within age, the lord was to have the ward and marriage of every one; but with this difference, that the *eldest only* was to do homage for herself and her sisters; and when the younger sisters came of age, they were to do their service to the lord of the fee by the hands of their eldest sister; the eldest, however, was not on that account to exact of the younger homage, ward, or any other mark of subjection; for they were all equal in consideration of law, and deemed as one heir only to the inheritance; and should the eldest have homage of her sisters, and demand wardship, the inheritance would be in a manner divided, so that the eldest sister would be *simul et semel* seignioress, and tenant of the inheritance,—that is, heiress of her own part and seignioress to her sisters, which could not well consist together, the law allowing no other distinction to the eldest sister but the chief mansion. Besides, if the eldest sister should receive homage of the younger, she would be seignioress to them all, and should have the ward of them and their heirs; which was always guarded against by the policy of the law, that never entrusted the person or estate of a minor to the custody of a near relation; which is the very reason given by Bracton<sup>2</sup> why the younger sisters should not be in ward to the eldest.<sup>3</sup>

The other statutes made in this reign are the *provisiones* or *statutum de Merton*, 20 Hen. III., and the statute *de anno bissextili*, 21 Hen. III., after which there appears none till the 51st year of this king.

The statute of Merton contains eleven chapters, which are arranged with as little order as those of  
Statute of Mer- *Magna Charta*. The several alterations or con-  
ton.

<sup>1</sup> *Vide* vol. i., 363.

<sup>2</sup> Bract., 88.

<sup>3</sup> The introduction of the English law into Ireland, and the progress it made there, may very properly become an object of consideration in another place.

firmations of the law thereby made were as follows. We have just seen what provision had been made on the subject of ward and marriage by *Magna Charta*. To secure lords in this valuable casualty, it was now further ordained, that when heirs were forcibly led away or detained by their parents or others, in order to marry them, every layman who should so marry an heir, should restore to the lord who was a loser thereby the value of the marriage; that his body should be taken and imprisoned till he had made such amends; and further, till he had satisfied the king for the trespass. This provision related to heirs within the age of fourteen; as to those of fourteen or above, and under full age, if such an heir married of his own accord without his lord's license, to defraud him of his marriage, and his lord offered him reasonable and convenient marriage without disparagement; it was ordained that the lord should hold the land beyond the term of his age of twenty-one years, till he had received the double value of the marriage, according to the estimation of lawful men, or according to the value of any marriage that might have been *bonâ fide* offered, and proved of a certain value in the king's court.

Thus far the interest of lords was secured. The following provision was to protect infants against an abuse of this authority in their lords. If any lord married his ward to a villein or burgess where she would be disparaged, the ward being within the age of fourteen, and so not able to consent, then, upon the complaint of the friends, the lord was to lose the wardship till the heir came of age; and the profit thereof was to be converted to the use of the heir, under the direction of her friends. But if the heir was fourteen years old and above, so as to be by law of capacity to consent to the marriage, then no penalty was to ensue.<sup>1</sup> Again, if an heir, of whatever age, would not consent to marry at the request of his lord, he was not to be compelled; but when he came of age, and before he received his land, he was to pay his lord as much as any would have given for the marriage, and that whether he would marry or not; for as the marriage of an heir within age was a lawful profit to the lord, he was not to be wholly deprived of it, but was to be recompensed in one way or other.<sup>2</sup>

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<sup>1</sup> Ch. 6.

<sup>2</sup> *Ibid.*, 7.

Some further provision was made respecting dower. It was provided by *Magna Charta*, that widows should give nothing for their dower; in order still further to secure to them a ready assignment of dower, it was now ordained, that persons convicted of deforcing widows of their dower, should pay in damages the value of the dower, from the death of the husband up to the time of giving judgment for recovery thereof; and they were moreover to be *in misericordiâ* to the king.<sup>1</sup> Because it had been doubted, whether, as a widow received her dower in the condition it was when her husband died, she should not leave it in like manner to the reversioner in the condition it was at her death; to remove this doubt, it was ordained, in favor of widows, that they might bequeath the crop upon their lands held in dower, as well as that upon their other lands.<sup>2</sup>

Usury, which we have before seen<sup>3</sup> was treated with little lenity by our old law, was now put under a particular restraint. It was provided, that usury should not run against any person within age, from the death of his ancestor, whose heir he was, until he arrived at his full age; a provision which was dictated, no doubt, by the consideration that the profits of the infant's lands went to his guardian during the wardship, and that he was thereby disabled from paying the annual interest. This new regulation was to be without any prejudice to the principal and the interest which had accrued in the lifetime of the ancestor.<sup>4</sup>

A provision made about commons of pasture was of great importance to lords of manors. When  
Of commons. a lord, having great extent of waste ground within his manor, infeoffed any one of parcels of arable land, it was usual for the feoffee to have common in such wastes, as incident to his feoffment; and this was upon very good reasons, for as the feoffee could not plough and manure his ground without beasts, and they could not be sustained without pasture, the tenant used to have this allowance of common for his beasts of the plough as appendant to his tenancy, and from thence arose common appendant. Right of common, therefore, was founded upon the general interest of agriculture, and the particular

<sup>1</sup> Ch. 1.<sup>2</sup> Ibid., 2.<sup>3</sup> *Ante* vol. i., 373.<sup>4</sup> Ch. 5.

one of the lord, whose land was thereby cultivated and improved. We have seen<sup>1</sup> that a remedy by assize had been devised to maintain tenants in possession of this right, but it seems this remedy had been pushed too far, and began to encroach upon the demesne and original right of the lord, who having suffered his tenants to range at large over his wastes, for which he had not yet found any use, could hardly appropriate any part thereof without the imputation of encroaching on his tenants, and being liable to an assize of disseisin of common of pasture. To prevent such usurpations upon the lord, and adjust the reasonable claims both of lord and tenant, the following regulation was made:—That when such feoffees brought an assize of novel disseisin for the common of pasture, and it was therein recognized before the justices that they had as much pasture as was sufficient for their freeholds,<sup>2</sup> and that they had free ingress and egress from their freehold to their pasture, then the person against whom the assize was brought should go quit for all the lands, wastes, woods, or pasture, which he had converted to his own use. But should it be alleged that they had not sufficient pasture nor sufficient ingress or egress, the truth thereof was to be inquired of by the assize; and if it was found as alleged, then they were to recover their seisin by view of the jurors, and the disseizor was to be amerced as in other cases.<sup>3</sup> (a).

The administration of justice was aided by a law concerning repeated disseisins, or, as they were afterwards called, *re-disseisins*. It was ordained, that when any person recovered seisin of his freehold, before the justices in eyre, by assize of novel disseisin, or by confession of the disseizors, and seisin had been delivered by the sheriff; if the same disseizors again disseized the same tenant of the same freehold, and were convicted thereof, they should forthwith be committed to prison till they were

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(a) The comment of the *Mirror* upon this is:—"The point of improvement of wastes is culpable, as being too general; for it ought to distinguish of commons; for in some places the commoners are enfeoffed in such a manner, that the whole common is only in the tenants; so that the lords have nothing but the soil; and in such case the statute is prejudicial to the commoners, and repugnant to the Great Charter, which willeth that none be cast out of his freehold without lawful judgment" (*Mirror*, c. v., s. 2). But it only applied where the commoners had sufficient.

<sup>1</sup> *Ante*, c. 4.

<sup>2</sup> *Ad tenementa sua*.

<sup>3</sup> Ch. 4.

discharged by the king upon payment of a fine. The way of bringing such contemnors of the law to punishment is thus directed by the statute. When complaint was made at the king's court, the parties injured were to have the king's writ directed to the sheriff, in which a relation was to be made *de disseisinâ factâ super disseisinâ*, of a disseisin upon a disseisin; and the sheriff was to be thereby commanded, that he, taking with him the keepers of the pleas of the crown<sup>1</sup> and other lawful knights, should go to the place in question, and there, in their presence, by the first jurors and other neighbors and lawful men, make diligent inquisition of the matter; and if the party was convicted, he was to be dealt with as before mentioned, if not, the plaintiff was to be amerced. The sheriff was not to entertain such a plaint without the king's special command, namely, by writ. What is here said of lands recovered in assize of novel disseisin, extended to those recovered by assize of mortuancestor, or in any proceeding *per juratum*.<sup>2</sup>

An alteration was made in the limitation of time for bringing certain writs. In a writ of right, as the law had been for some years, a descent might be conveyed *à tempore Henrici regis senioris*; but it was now ordained that there should be no mention of so distant a time, but only *à tempore Henrici regis avi nostri*. Writs of mortuancestor, *de nativis*, and *de ingressu* (a writ which had lately sprung up, and of which more will be said hereafter) were not to exceed *ultimum reditum domini regis Johannis patris nostri in Angliam*, King John's last return from Ireland into England; nor writs of novel disseisin, *primam transfretationem domini regis Henrici, qui nunc est, in Vasconiam*.<sup>3</sup>

Before another chapter of this statute is mentioned, it may be convenient to recollect that there were two kinds of suits: suit *real*, as it was afterwards called, and suit

<sup>1</sup> *Vide ante*, where these are supposed to be the coroners of the county.

<sup>2</sup> Ch. 3.

<sup>3</sup> Ch. 8. Henry I. began his reign, A. D. 1100; Henry II., A. D. 1154; King John went to Ireland in the twelfth year of his reign, and returned the same year; between that and the 20th Henry III. were about twenty-five years. Henry III. went into Gascony for the first time in the fifth year of his reign; so that there were about fifteen years between that and the statute of Merton (2 Inst., 94, 95). Writs of mortuancestor before this act were *post primam coronationem Henrici II.*, which was 20th October, 1154. Those of novel disseisin were *post ultimam transfretationem Regis in Normanniam*, which was in 1184, the thirtieth year of his reign.

*service*. Suit real was, in respect of residence, due to a leet or toun; suit service was, by reason of tenure of land, due to the county, hundred, wapentake, or manor, whereunto a court baron was incident. Every one who held by suit service was required to appear in person, because the *suitors* were judges in those courts; and if he did not, he would be amerced, which was a heavy grievance; for it might happen that he had lands within divers of those seigniories, and the courts might all be kept in one day; therefore, as he could attend personally only at one place, it was provided by this act, that every freeman who owed suit to the county, trithing,<sup>1</sup> hundred, wapentake,<sup>2</sup> or to the court of his lord, might freely make his attorney to do suit for him.<sup>3</sup> This permission did not enable him to do the same at the leet or toun, because he could not be within two leets or two tourns.<sup>4</sup>

It is recorded in the statute of Merton, that the question about the legitimacy of children born before wedlock was still agitated between the clergy Of special bastardy. and common lawyers; the former maintaining their legitimacy, according to the constitution of Pope Alexander; the latter alleging this to be contrary to the common law; as hath been mentioned before.<sup>5</sup> The bishops now urged in council, that when the king's writ of bastardy was directed to them, to inquire whether a person born before wedlock was entitled to the inheritance, they neither could nor would give any answer thereto, because the question was put in a special way, and not in the form required by the church, which was general, whether bastard or not; and therefore, to make an end of the controversy and the difficulty at once, they prayed the nobles to consent that all such as were born before matrimony should, consistently with the law of the church, be deemed legitimate, and be entitled to succeed to the inheritance, equally with those born within wedlock.<sup>6</sup> But the statute says, *omnes comites et barones unâ voce responderunt, quòd nolunt leges Angliæ mutari, quæ hucusque usitatæ*

<sup>1</sup> A district containing three hundreds.

<sup>3</sup> Ch. 10.

<sup>5</sup> *Vide ante*, c. 3.

<sup>2</sup> Another name for a hundred.

<sup>4</sup> 2 Inst., 99.

<sup>6</sup> This piece of canonical jurisprudence is actually adopted in the law of Scotland. They consider the subsequent marriage as having been entered into when the child was begotten; and therefore it is confined to the case of such women, whom the father, at that period, might have married. *Ersk. Prin.*, b. 1, tit. 7, sect. 37.

*sunt, et approbatæ.*<sup>1</sup> This point of difference between the canon law and the law of the land did not rest here. In the same year, a solemn agreement was made between the king, bishops, and barons in council assembled, and by this the practice was settled, as will be shown when we come to speak more particularly on the subject of bastardy. The nobles, who resisted the inclination of the ecclesiastics with such firmness, had no scruple to propose an innovation which had no object but to accommodate these potent landholders, at the expense of the liberty of the subject; but in this they were opposed by the king, who refused his consent: the proposal was, that they might imprison in a prison of their own all persons that were found trespassing in their parks and vivaries.<sup>2</sup>

In the next year there follows in the statute-book a public instrument which is entitled the statute *de Anno Bissextili*, 21 Hen. III., but which is, in truth, nothing more than a sort of a writ or direction to the justices of the bench, instructing them how the extraordinary day in the leap-year was to be reckoned in cases where persons had a day to appear at the distance of a year, as on the essein *de malo lecti*, and the like. It was thereby directed that the additional day should, together with that which went before, be reckoned only as one, and so, of course, within the preceding year.

After this there are no statutes (except the confirmation of the charters, 38 Hen. III., which has been mentioned already) till the fifty-first year of this king. During this interval of thirty years great progress was made towards bringing the law to that state of consistency and learning to which it arrived in this reign (*a*); there is

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(*a*) Thus we find the point of the law of descent stated by Bracton, as cited by Pateshall, justice:—"Ut de itinere Martin de Pateshall in comitatu Hertford, anno regni Henrici Quarti, in fine rotuli" (fol. 13). So an important decision as to imbecility of mind, that a person paralyzed may be of sound mind:—"Et notandum quod si paralyticus itineret de loco in locum et discretionem habet ab eo præsumatur quod omnia rite gesserit, et de aliis non est ita intelligendum, quia quamvis itinerare non possit, tamen bonam memoriam habere poterunt. Et de hac materia plenius invenis de termino anno regni Henrici decimo quinto in comitatu Berk, de Roberto de Burnley" (fol. 15). So an important decision as to donations, that they must be free, and not in any way the result of coercion:—"Gratuita debet donatio et non coacta, nec per metum vel vi extorta ut si quis cartam et donationem cognoverit requisitus excipiat tamen quod valere non debeat, eo

<sup>1</sup> Ch. 9.

<sup>2</sup> Ch. 11.

also the strongest proof<sup>1</sup> that the treatise of Bracton was

quod per metum et coactionem tempore guerræ aliove quocunque tempore illam fecerit revocabitur donatio, etc., ut inter placita quæ sequuntur regem, anno regni regis Hen. II. inter priorem de Wallingford et Rogerum de Quincy" (fol. 17). And so another, ruling that if it is in time of peace, the man must promptly disclaim the donation:—"Si autem tempore pacis compulsus fuerit quis per metum et vim in prisiona ad aliquid dandum vel faciendum contra voluntatem suam, cum a prisiona et violentia evaserit, statim debet levare hutesium et clamorem, et accedere debet ad villas propinquiores, et ad servientes regis, et postea ad comitatum, et ibi ostendere violentiam ei factam et sic revocabitur quod actum erit. Si autem dissimulaverit, videtur consentire, ut de quodam itinere S. de Segrave, in comitatu Kantii, de Petro de Peke qui summonitus fuit ad warrantandum Falconi de Breaute, quandam cartam de manerio de Middleton; et unde iudicium redditum fuit apud Westmonasterium" (fol. 17). Now, a little piece of contemporary history renders this case—a leading case (as it is the earliest) in the law of duress—very interesting, and illustrative of the times. This Falcon de Breaute is described by Matthew of Westminster, A. D. 1215, as one of the retainers of John, and as a most atrocious plunderer. He is described as seizing noblemen, and even ladies, and clerics of the highest rank, in order to extort ransom from them. In the reign of Henry III. this man became so outrageous, that he actually seized the king's justiciary, and imprisoned him in his castle. This was too much for the king, who levied an armed force, laid siege to the castle, and when, after two months, he had taken it, he hanged all who were in it (A. D. 1224). This may serve to show that these cases were then of actual and frequent occurrence, and that the law of duress was then of very considerable practical importance. Other cases are cited: "De itinere Abbatis de Rading et Martin de Pateshall in comitatu Leycestriæ (fol. 13), and in comitatu Bedeford de Richardo le Hare" (*Ibid.*). Sometimes, it will be observed, that the decisions are quoted of the justices of the Bench—*i. e.*, the judges of the *curia regis*, the king's court. As a point of villenage:—"Dictum est in curia regis coram iusticiariis de banco apud Westmonasterium per Johannem de Metingham et socios suos Iusticiarios" (fol. 26). Generally, however, the cases are from the itinera. So a point of law as to gifts of land in frankalmoigne (that the heir is bound to warrant or defend, if he knew of the gift), is cited as decided by the celebrated Pateshall:—"De itinere Martin de Pateshall, de loquela diversorum comitatum, quæ fuerunt super iudicium in itinere suo anno regni tertio Henrici de magistro militiæ Templi in Anglia," in the case of the Knights Templar of England (fol. 28). So another important point on the same subject—*viz.*, that if, a few days before death, a man gives land to a religious house, the heir could not recover it, is cited as ruled by the same justice in his last circuit:—"Ut de ultimo itinere Martin de Pateshall in comitatu Eborum" (fol. 28). So an important decision as to advowsons, that they could not be transferred, except as incident and attached to the property in land:—"Et quod advocatio quod incorporalis est, transferri non potest, sine re corporali et tenemento, probatur de termino Sancti Hilarii, anno regis Henrici nono comitatu Norf, inter abbatem de Messendene et Hubert de Burgh, de ecclesia de Owaltun, ubi idem abbas protulit quandam chartam cujusdam Walteri de la Penne, quod testabatur quod idem Walterus dedit ei advocationem illius ecclesiæ, sed quia postea convictum fuit quod idem Walterus nullum tenementum habuit in manerio in quo ecclesia sita fuit, nec idem W. nunquam presentavit ad ecclesiam illam, consideratum fuit quod abbas nihil capiat" (fol. 54). "Item ad hoc facit quod habetis de termino

<sup>1</sup> *Vide post.*



written within this space of time(*a*); and that the ac-

Sancti Hilarii anno regis Henrici sexto comitatu Staff. de Raulf comite Cestrie et Priore de Kenelwyde, de ecclesia de Stoke, ubi dicitur quod ille qui dedit advocacionem priori nec aliquis antecessorum suorum, nunquam seysinam habuit presentandi nec aliquod tenementum in villa illa, consideratum quod donatio illa nulla. Item ad hoc facit quod habetis de termino Paschæ anno regis Henrici nono in comitatu Cornubiæ de Ricardo de Wyks et Priore de Tuwardrey, ubi non valuit donatio facta de advocacione quia ille qui dedit nunquam facit in seysina presentandi nec terram aliquam habuit in villa illa, ad quod advocatio illa potuit pertinere; quod vis multæ confirmationes, episcoporum et dominorum capitalium intervenissent" (*Bracton*, lib. ii., c. 22, fol. 54). "Et quod donatio facta de advocacione valere non debeat, ante quam donata fecerit in possessione presentandi, probatur in rotulo, anno reg. Hen. oct. in comitatu Bed. Item ad hoc facit quod habetis de itinere Martin de Pateshall in comitatu Wygorn: anno reg. Hen. quinto. Item nec valet donatio advocacionis, si ille qui dedit nunquam habuit seysinam presentandi nec aliquid de manerio ne tenementi ad quod advocatio pertinuit, ut inter *placita quæ sequuntur regem*, anno regni regis Henrici tertii vicesimo secundo in comitatu Salop: de Godfridis de Gamages, ubi idem Godfridus dixit *coram rege* quod antecessor suus dedit patri suo quandam terram cum advocacione ecclesiæ, et unde convictum fuit quod antecessor nunquam seysina inde habuit, et ideo donatio nulla. Item ad hoc facit ann. R. Hen. 10, in comitatu Leyc. inter Walterum de Redgrave et priorem de Undeleigh, ubi idem Walterus nil capere potuit per assisam quia comes de Ferraris qui manerium illud ad quod advocatio illa pertinuit dedit prædicto Waltero, nunquam presentavit ad ecclesiam illam. Item ad hoc facit quod habetis de anno Hen. 9, inter priorem de Lewes, et de novo mercato de ecclesia de Hatfelt," etc. (*Ibid.*, p. 55). These cases are cited as showing how constantly they occurred, and how the right of presentation was contested, and how the right was made to depend entirely upon actual possession of temporal property. A case between the Abbot of St. Albans and Galfrid de Chyldwike, about the franchise of a free warren, is cited as having been decided "apud Westmonasterium coram ipso Domino rege," *i. e.*, in the king's bench, as it concerned a royal franchise (lib. ii., c. 24, p. 56). It may be mentioned, that such portions of Bracton as are not founded on such decisions, are founded on Glanville and Justinian. And as regards civil matters, perhaps by far the largest portion of Bracton is taken from the latter sources, whence, also, there is little doubt, the judges whose decisions are cited derived their light; for where else could they have derived it? As regards criminal matters, however, the criminal law being more a matter of custom, the decisions of the justices itinerant are more fully quoted; and the chapter "De Corona" commences with their commissions and authorities.

(*a*) It has escaped the attention of the author that the great work of Bracton contains brief accounts of numerous cases decided, during this period, on the itinera or circuits of the judges. These are the earliest of our law reports, with the exception of the brief notices in the *Mirror* and the *Abbreviatio Placitorum*; and some of them may be of interest, as showing the gradual course and development of law by means of judicial decisions, which took place in consequence of the establishment of a regular judicature. In one passage Bracton says, it is not sufficient for the plaintiff to propound and ground his case, etc., unless he also proves it according to what was proved in the itinera of Bishop of Dunwich and Martin de Pateshall, in the county of York, 3 Hen. III., in the case of Aghevilda Murdac. And, again, that if the claimant gives no proof, it is not necessary for the tenant to answer, for that a case may fail in proof as well as in law:—"Quia posset deficere

count of the law given by that author does not include the alterations made therein by the statutes passed in the 51st and 52d years of this king. It seems therefore the most natural order to postpone the consideration of those statutes till we have taken a view of the previous state of the law, from whence we may proceed to the alterations made therein by those statutes.

This view of the law, as it stood towards the end of the present reign, will include in it not only a fuller account of what has been before delivered from the authority of Glanville, but likewise the numerous additions, variations, and improvements that had been made since his time. This will be extracted, as we promised, from that great ornament of our ancient jurisprudence, the treatise of Bracton, from which such parts will be selected as are thought best suited to the design of this history of our judicial polity. As the plan we here propose will lead us to reconsider all or most of the topics which were examined in the reign of Henry II., it will be very difficult to avoid the appearance of repetition. This will be guarded against as much as possible, and we trust that the reader will be satisfied that no subject is brought before him a second time, but where the nature of the inquiry and the progress of the history made it absolutely necessary.

We shall begin our short view of the law in this reign with some observations on the rights of persons. The ranks of freemen are stated by Bracton to be these: dukes, earls, barons, *magnates*, or vavasors, knights, and those who were plain freemen. Vavasors, he says, were persons *magnæ dignitatis*, and were so called *tanquam vas sortitum ad valetudinem*.<sup>1</sup> The condition of *servi*, or *villani*, as they were commonly called, is more particularly described by this author than by Glanville, and the nature of that state may be tolerably well collected from his account of it.<sup>2</sup> The *servus*, though he was generally considered as *in potestate domini*, and not *sui juris*; yet, as to life and limb, he was entitled to the pro-

Ranks of persons.

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probatio licet nunquam deficiat jus," as was held in the itinera of the Bishop of Dunwich and Martin de Pateshall, in the county of York, the 3 Hen. III., in the case of Reginald Shurdake. — (*Bracton*, 326.) Others of these cases have been already cited, *ut supra*.

<sup>1</sup> Bract., 5 b.

<sup>2</sup> *Vide* Schmidt Geschichte, etc., vol. i., 596.

tection of the law. The lord might take from his villein everything he had, even his principal piece of property, which was usually his *waynagium*, or implements of husbandry; the rule being, that *quicquid per servum acquiritur id dominio acquiritur*.<sup>1</sup> These *servi* did not escape from their condition by going off the land of the lord, if they continued in the habit of returning; and sometimes they used to be permitted to absent themselves for a length of time from the lord's lands, and employ themselves in trade, upon paying to the lord a fine called *chevagium*, or chiefage, as an acknowledgment of their subjection and villenage (*a*). But if they left the lord's land without returning regularly, or ceased to pay their *chevagium*, they were then considered as fugitives; and when they were once become fugitive, they were to be pursued and demanded by the lord, both within liberties and without; for which purpose the aid of the king's officers might be had:<sup>2</sup> and after such claim had been made, the *servus*, though he was not taken till after a year had elapsed, might be detained; but if no such claim had been made, then, at the end of a year, the *servus* would be privileged, and considered as free. So strictly was claim required to be made, that if the lord, after the lapse of three or four days only, without making any claim, had taken him anywhere *extra villenagium*,<sup>3</sup> beyond the limits of his villenage, he would have been liable to an action for imprisonment.

(*a*) It is remarkable how tenaciously the author confounds the slave with the villein. The *Mirror*, which followed Bracton, most carefully distinguished them, as did Bracton himself, and it is remarkable how the *Mirror* and Bracton correspond. Thus, as to villeins, the *Mirror* says: "Villeins be not all slaves, for these can purchase nothing but to their lord's use. They know not in the evening what service they do in the morning, nor any certainty of their service. Their lords may fetter, imprison, beat, or chastise them (saving their lives and members); they may not fly from their lords so long as they find them wherewith to live, nor is it lawful for others to receive them without their lord's consent; they can have no manner of action without their lords; and if they hold lands of their lords, it is intended that they hold them from day to day at their lord's will, and not by any certain tenure." "Villeins are tillers of land dwelling in upland villages, for by vill cometh villein, and of villeins mention is made in the Great Charter of liberties, where it is said that a villein be not so grievously amerced that his tillage be not saved to him; but the statute maketh no mention of slaves, because they have nothing of their own to lose." Here villeins are carefully distinguished from slaves.

<sup>1</sup> Bract., 6.

<sup>2</sup> *Ibid.*, 6, b.

<sup>3</sup> *Extra villenagium*, that is, "out of his state of villenage," or beyond the lord's villein-territory.

It seems that villeins in the king's demesnes were of different kinds. There were those who had been such before the Conquest, and who, in consequence of the polity then established, were permitted to hold their land in villenage,<sup>1</sup> by villein and uncertain services, and who were to do everything which their lords commanded them. But in the disorder of that revolution, many freemen were dispossessed of their lands by the lords to whom they were allotted, and were afterwards permitted to hold them in villenage, with the burden of doing some villein offices, which however were certain and specified. These persons were, according to Bracton, sometimes called *glebæ adscriptitii*, because, so long as they did the appointed services, they had the privilege *not to be removed* from the land; and were indeed freemen: for though they did villein services, yet it was not in their own personal right, but on account of their tenement, which was held in villenage, though, says Bracton, a sort of privileged villenage.<sup>2</sup> "There was," says the same authority, "another holding in the king's demesne manors, which was by the same villein customs and services as the former, and yet was not villenage; nor were the tenants *servi*; nor did they derive their title from the Conquest, as the former did, but by covenant with their lords; so that some of them had charters, and some not; and these, if ejected, might recover seisin by assize, which none of the former could. Besides these, there were also tenures by socage, and knight-service, in the king's demesnes." These latter, says Bracton, were *ex novo feoffamento*<sup>3</sup> and *post Conquestum*; by which he seems to intimate his opinion as to the origin of the two principal tenures — those in socage and by knight-service.<sup>4</sup>

A villein might also become free by manumission; which was a solemn and express act of declaring him free. There were other acts of the lord which were construed to amount to a declaration of a villein's liberty, because they put him into a condition incompatible with a state of servitude. Thus, if a lord was to receive homage of his villein, or should, without any express manumission, give land to his villein, *habendum et tenendum liberè* to him

<sup>1</sup> Vide vol. i., 245.

<sup>2</sup> Bract., 7.

<sup>3</sup> But see Madox *Excheq.*, vol. i., 578, of old feoffment and new feoffment.

<sup>4</sup> Bract., 7 b.

and his heirs, though no homage was done, such gift was considered as an intimation that the donee should become a freeman. Nevertheless, if a gift was made to hold *per liberum servitium*, it was otherwise; there being, according to Bracton, a difference between holding *liberè* and *per liberum servitium*; for, as a tenure in villenage would not make a freeman a villein, so a holding by free service would not make a villein free, unless it was preceded by homage.<sup>1</sup>

Bracton speaks of two orders of villeins: namely, those who held in *pure villenage*, and those who held in *villein socage* (a). In the former, the service was uncertain and indeterminate; so that the villein, according to his expression, did not know in the evening what was to be done in the morning, but was to do everything that was commanded him: in the latter, the service was certain; and yet the holding was not *liberum tenementum*, or freehold. Neither of these could alien their lands, as freeholders could; and if they did, it might be recovered at law:<sup>2</sup> but the way in which a villein sockman was to make a transfer of his estate, was this: he was first to make a surrender of it to the lord, or, if he was not present himself, to his steward,<sup>3</sup> and from his hands the conveyance was to be made to the purchaser; and this was considered as the gift of the lord, in whom, and not in the villein sockman, the freehold resided.<sup>4</sup> Bracton does not say whether those who held in pure villenage had even the power of transferring their lands in this limited way; and it should seem, they had not yet obtained such privilege.

We are enabled to speak more particularly of tenures than we did in the reign of Henry II.; they had now become more defined, were better

(a) This has already been pointed out more than once. Here, again, it will be observed how closely the *Mirror* follows Bracton, and distinguishes slaves from villeins. The *Mirror* word for word corresponds with Bracton, so that the author must have studied the great treatise. Speaking of slaves, the *Mirror* says: "They know not in the evening what service they shall do in the morning, nor is there any certainty of their service." But of villeins he says, "they are tillers of land," which is the description of socage-service as given by Bracton and Littleton, that is, ploughing the land, a service certain and defined in its nature. Yet, being at the will of the lord, and, although certain in its nature, not so as to its extent, it was not free socage, but servile socage, or, as Bracton calls it, villein socage. This was the origin of our copyhold tenure, as socage was of our freehold tenure. Pecuniary commutation, by way of price or fine, lay, probably, at the basis of the conversion of the tenures.

<sup>1</sup> Bract., 24 b.

<sup>2</sup> Ibid., 26.

<sup>3</sup> *Servienti*.

<sup>4</sup> Bract., 26.

understood, and treated with much more refinement. Tenure depended on the services reserved at the time of the feoffment (*a*); and therefore, to understand the nature and variety of tenures, it will be necessary to consider more particularly the clause of *reddendum*, by which the services were reserved in deeds of feoffment. When a donation was made by a private person, it was usual to express in the deed, with some precision, whatsoever was to be rendered to the donor in compensation for the thing given. Thus a gift was made sometimes *pro homagio et servitio*, for homage and service; sometimes for service only, without homage. If it was intended to create a knight's fee, the proper reservation would be *pro homagio et servitio*; but in the creation of a socage-tenure, it would not be so proper; as fealty only, and not homage, was due

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(a) It was not necessary that there should be any deed to create a freehold estate of inheritance, and the giving of such an estate conferred entire freedom. Thus the *Mirror* says, "Villeins become freemen if their lords grant or give unto them any free estate of inheritance to descend unto their heirs, or if the lord take their homage for their land" (c. iii., s. 28); and it is observed, "that by the first conqueror earls were enfeoffed of their earldoms, barons of their baronies, knights of knight's fees, serjeants of serjeanties, villeins of villenages, burgesses of boroughs, whereof some received their lands without obligation of service," i. e., a frankalmoigne, some to hold by homage and by service, as for defence of the realm; and some by villein customs, as to plough the lord's lands, to reap, cut, and carry his corn or hay in such manner of service without giving of any wages, whereof many fines were levied of such services, which make mention of them. And although it be that the people have no charters, deeds, nor muniments of their lands, nevertheless, if they were ejected, or put out of their possession wrongfully, by bringing an assize of novel disseisin, they might be restored to their estates as before, because they could aver that they knew the certainty of their services as those whose ancestors were astraces for a long time; and therefore Edward in his time caused inquiry to be made of all such who held and did to him such services as ploughing his land, etc. And afterwards many of these villeins were forced by wrongful distresses to do their lord's service, to bring them into servitude again, for which their remedy was by a writ of *ne injuste vexes*. Now it is most remarkable that in this passage (evidently written soon after the Conquest) among the tenures enumerated, common freehold is not mentioned. Tenure in knight-service is mentioned, and tenure in villenage; and then it is described how, out of these last, freehold tenure arose, by the lords giving the villeins free estates of inheritance, on condition of plough-service, which in its nature was certain, and not deemed base, though servile. It is also pointed out that not only did this require no deed, but not even express a formal gift; it was enough if homage were taken for the land, as that implied freedom. Then came the socage freehold tenure, as it was called, of which Bracton, transcribed by our author, speaks; in his time it having become established as a known freehold tenure, whereas in the time the above passage in the *Mirror* is mentioned, it was just arising.

for socage-land: and indeed should homage have really been done, yet this would not entitle the chief lord to wardship and marriage, for ward and marriage did not so properly follow the homage, as the service, which in fact, and which alone, made a tenure, either military or socage. Thus it often happened that homage was not required even in military tenures; as where one made a gift to his eldest son and heir, or a brother to a younger brother, such gifts were usually made without reserving homage, lest the donor should be excluded from succeeding to the inheritance by the rule *nemo potest esse dominus et hæres*. For the same reason, gifts, when made to a younger son, used to be, *pro servitio tantum, tenendam de me totâ vitâ meâ sibi et hæredi bus suis, et post mortem meam de capitalibus dominis pro servitio quod illam terram pertinet*. When the service was reserved in this way, the elder son might be heir to the younger, because there was no homage to constitute a *dominium*: if the gift had been *tenendam de capitalibus dominis*, it would have excluded him from the wardship also. In like manner, if a gift was made by the father to the eldest son, whether it was *pro servitio* or *pro homagio*, if it was to hold of the chief lord of the fee, and he died in the life of the father, the younger brother would succeed, and the father be excluded from the wardship: if he was a minor, the ward and marriage would belong to the chief lord, and if of full age, the relief likewise.<sup>1</sup>

The reservation was sometimes *reddendo* so much *per annum* at certain times, or *faciendo* such and such services and customs, *pro omni servitio, consuetudine seculari, exactione, et demandâ*; by which all secular demands that belonged to the lord in right of the tenement were remitted. It must be observed of services and customs, that some belonged to the lord of the fee, and some to the king, corresponding with the distinction before mentioned between *suit service* and *suit real*.<sup>2</sup> Of the latter kind, says Bracton, were *sectæ ad justitiam faciendam*, as in writs of right; *ad pacem*, to sit in judgment on a thief; and *pro aforciamiento curiæ*. To the donor of the land belonged such services as were due in recompense of the thing given, as rents, whether in gold or silver, in moneys numbered; as if it ran *reddendo inde per annum decem*

<sup>1</sup> Bract., 34 b.

<sup>2</sup> *Vide ante*, 59.

*aureos, argenteos*; or whether it consisted in fruits and profits of the ground, *reddendo inde per annum decem coros tritici*, four quarters of barley, four barrels of oil, or the like. Sometimes the reservation was made optionally; as, *reddendo inde per annum* so many gilt spurs, or sixpence, or a pound of pepper, or cumin, or wax, or a certain number of gloves; in which cases it<sup>1</sup> was at the option of the tenant which of them he would pay. Some services were to be performed to the lord of the fee, and consisted in doing some act at certain seasons: unless such services were specified, they would not be demandable; as where it was said, *et faciendo inde sectam ad curiam domini sui, et hæredum suorum, de quindenâ in quindenam*, etc., or, *faciendo inde* so many ploughings or reapings, and the like; all which belonged to the lord of the fee, and were due out of and in right of his farms and tenements, and therefore were not personal, but feudal or predial services.

A person might infeoff another to hold *by serjeanty*, which was of different kinds: some such services belonged to the lord who infeoffed; some to the king. Thus, for instance, when a person was to hold by the service of riding with his lord,<sup>2</sup> or of holding the lord's pleas, or serving his writs within a certain district, or feeding his dogs or hounds, keeping his birds, finding him in bows and arrows, or carrying them, and innumerable like services; all these were called serjeanties. Services being divided into such as were called *forinsic* and such as were denominated *intrinsic*, all the above mentioned they considered in a particular manner as *intrinsic*, because they were of necessity to be expressed in the charter; and they were likewise reserved to the lord of the fee, and had not any reference to the king's army or the defence of the realm: in such tenure no ward or marriage accrued to the lord, any more than in socage. These were usually called *petit serjeanty*, to distinguish them from such as related to the king only. A serjeanty of this latter kind was,<sup>3</sup> when a person was infeoffed by

Of serjeanty.

<sup>1</sup> Bract., 35.

<sup>2</sup> Which tenants, says Bracton, are usually called *Rod Knights*.

<sup>3</sup> It might be expected that Bracton should call this latter *magna serjeantia*, to distinguish it from the other kind; but he does not. In another part of his book we are told by this author that serjeanty was divided into *magna* and *parva*, with respect to its *value*, and, as it should seem, not with



the service of finding one or more men to go with the king upon any military expedition with some kind of accoutrement; and from such a serjeanty, whether held of the king or a private person, there were due to the chief lord the ward and marriage of the heir.<sup>1</sup>

It was before said, that the above services, which were specified in the deed, were called *intrinsic*. This term and its opposite were not wholly confined to express that services were or were not in the charter; for some other services, though expressly named in the charter of feoffment, were termed *forinsic*, because they belonged to the king, and not to the chief lord. These were performed without the tenant appearing in person, for he might satisfy the king, some way or other, for the service: they were due as accident or necessity made them requisite, and were called by various names. They were not only termed generally *forinsic*, as they belonged to the king, but had various other names of a more specific import. They were sometimes called *scutagium*, sometimes *servitium domini regis*; the meaning of which was this: they were called *forinsic*, because the service was done, *foris* abroad, that is, *extra servitium* due to the chief lord; *scutagium*, because it related *ad scutum*, and the military service; *servitium regis*, because it belonged to the king, and not to the lord; and a feoffment by either of these latter appellations was considered as the same thing: yet if a charter gave land *faciendo inde forinsecum servitium*, etc., the service, or the substitute for service, was to be expressed; as by the service of one knight's fee, or more; by the scutage of a hundred shillings; and the like.<sup>2</sup>

There were other customs and dues which were neither intrinsic nor forinsic, but were rather, says Bracton, *concomitants* of services regal or military, and of homage. These were relief, marriage, and wardship, which need not be expressed in the charter; because if homage and

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any distinction between a service performed to the king, and to a common person. This value appears not to have been very accurately defined. He says that, according to some, it was a great serjeanty if valued at 100 shillings; and those, says he, might be called *petit serjeanty* that were worth half a mark. (87 b.) Whatever difference of opinion there was about the names, there seems to have been none about the consequences of the respective services, namely, in what cases ward and marriage were demanded by the lord, and in what not.

<sup>1</sup> Bract., 25 b.

<sup>2</sup> Ibid., 36 b.

regal service preceded, it followed that these belonged to the chief lord, whether it was a knight's service, or a serjeanty relating to the army. There were other customs and dues which, Bracton says, were not called services, nor the concomitants of services; as reasonable aid to make the eldest son a knight, or marrying his eldest daughter; which aids were *de gratiâ*, and not *de jure*,<sup>1</sup> and were in consideration of the lord's necessities; for they were only to be demanded of his freemen in cases of necessity. These aids, too, were considered as personal, and not predial; for they respected the person, and not the fee, as may be collected from the terms of the king's writ which used to issue to the sheriff, commanding him, *quodd justè et sine dilatione habere faciat tali rationabile auxilium de militibus liberè tenentibus suis in ballivâ suâ*, etc. As these aids were not to be levied at the pleasure of the lord, respect was to be had, in assessing them, to the circumstances both of the tenant and lord, so as the lord might be relieved without oppressing the tenant; or, as Bracton says, *quodd auxilium accipienti cederet ad commodum et danti ad honorem*.<sup>2</sup>

A man might be infeoffed by divers kinds of services; as, by the service of one penny, and rendering scutage (that is, when demanded for particular occasions, as before mentioned), and by one or more of the serjeanties above noticed. If the render was to be only in money, without any scutage or serjeanty; or if two services were required optionally, as to give some certain thing *pro omni servitio*, or a certain sum of money; such a holding was called *socage*: but though it was only for the payment of one farthing, if scutage and real service were added thereto, or if any serjeanty was reserved, it was considered as knight-service.<sup>3</sup> The creation of all these tenures depended on the pleasure of the feoffor; for whatever might be the service he was bound to perform towards *his* feoffor, he might exact either more or less, upon making a feoffment to another. Thus a tenant by knight's service might infeoff another in socage, or make a grant in villenage. Again, he might require knight's service, though he held only in socage:<sup>4</sup> and in such case, as well as in others, the tenant was protected against the

<sup>1</sup> *Vide* vol. i., 382.<sup>2</sup> Bract., 36 b.<sup>3</sup> *Ibid.*, 37 b.<sup>4</sup> *Ibid.*, 36.

chief lord by the warranty of the mesne, who stood between them.

The different kinds of tenure appear, from the above inquiry, to be these: some were by military service, since called knight's service, others by serjeanty; for which homage was to be done to the chief lord, because of the forinsic and regal service, and of that which related *ad scutum*, and the military calls for the defense of the country. Another was a holding *in soccagio libero*, in *free socage*, where the service to the chief lord consisted in money and nothing was due *ad scutum et servitium regis*: this was called socage from *soccus*, a plough; because the tenants thereof were deputed, as it should seem, merely to be cultivators of the ground. In this tenure the ward and marriage belonged to the nearest relations; and though homage should *de facto* be done for such land as it sometimes was, the chief lord was not on that account entitled to the ward and marriage, as those casualties did not always, though they usually did, follow homage. There was another kind of socage, called *villein socage*, where homage was never done, but only the oath of fealty was taken; the lord being interested to see that his villein did not, by any surprise, become his homager.<sup>1</sup>

We are next to consider the circumstances of tenure, the principal of which were *homage*, *fealty*, and *relief*. Much stress was laid on homage, to which was ascribed greater efficacy than to any other part of this system, as it was the tie of feudal connection between lord and tenant. Homage is therefore defined by Bracton to be that legal bond by which a lord is held and bound to warrant, defend, and quiet his tenant in his seisin against all mankind, for a service performed by him, as expressed in the deed of gift; and, on the other hand, that obligation by which a tenant was equally bound to preserve his faith towards his lord, and to do his proper service; which connection, as has been before shown, is thus expressed by Glanville: *tantum debet dominus tenenti, quantum tenens domino, præter solam reverentiam*.<sup>2</sup>

Homage was to be done at the time of the gift being made, either before or after seisin: if seisin was not delivered, the homage, says Bracton, had no effect.<sup>3</sup> Homage

<sup>1</sup> Bract., 77 b.<sup>2</sup> Ibid., 78 b.<sup>3</sup> Ibid., 79.

was to be done several times by the same tenant to the same lord, if for different freeholds. It was due for all lands, tenements, and rents; and for everything else which was held by any of the tenures before-mentioned.<sup>1</sup> Homage was not due for a tenement that was held only for a term (which included an estate for term of life), but *fealty* only. The person who was to do homage, says Bracton, was to seek his lord wherever he could be found; he was to approach him with reverence, and put both his hands between those of his lord: by which was meant to be signified on the part of the lord, protection, defence, and warranty; on the part of the tenant, reverence and subjection; and he was to pronounce in that posture these words: *Devenio homo vester de tenemento quod de vobis teno, et tenere debeo, et fidem vobis portabo de vitâ et membris et terreno honore, contra omnes gentes, salvâ fide debitâ domino rigi, et hæredibus suis*; which agrees in substance with the form in Glanville's time.<sup>2</sup> After this he was to take his oath of fealty, the form of which is not mentioned by Glanville, and is as follows: *Hoc audis, domine N. quodd FIDEM vobis portabo de vitâ et membris, corpore et catallis, et terreno honore: sic me Deus adjuvet, et hæc sancta Dei evangelia*. The difference between homage and fealty was this; that in the oath of fealty, which was the lesser obligation, the tenant engaged to bear his *faith* to his lord; in the other, he in addition thereto said *Devenio vester homo*, that is, he became his *homager*.

Homage was not to be done in private, but in some public place, where everybody had access; as in the county or hundred court, or in the court of the lord, in the presence of many persons, that the lord might have witnesses of the tenant being bound to him. Again, it was requisite that a diligent examination should be made at the time, whether the person doing homage was entitled to the land; as whether he was right heir to the person last seized; what was the kind and size of the freehold; whether he held it in demesne, or in service; or what part thereof one or the other;<sup>3</sup> all which was to prevent either the lord or the tenant being deceived. The effect of homage was such, that this caution seemed highly necessary; for when a person had done homage to

<sup>1</sup> Bract., 79 b.<sup>2</sup> *Vide* vol. i., 377.<sup>3</sup> Bract., 80.

one who turned out not to be his true lord, yet he could not recede from the obligation of homage, without the judgment of some court, so long as he held the land for which he did it.

There were many ways in which the homage was dissolved; as, if either lord or tenant did anything to the disherison of the other; in the former case, the lord was to lose his *dominium*; in the latter, the tenant was to lose his tenement. Again, should the lord die without heirs, the homage on his part was gone, but it revived in the person of the next superior lord, and still continued in the person of the tenant: the same if the lord committed felony. In these cases, the superior lord could not waive the homage which was to commence between him and the inferior tenant; for the tenant would then be deprived of his warranty. Besides, it might happen that by the feoffment the tenant was bound only to the service of a penny, while the superior lord was bound by the feoffment he had made to the mesne lord, to the warranty of a hundred librates of land; and there is no doubt but, in such case, a lord would gladly renounce his claim of homage, if the law would permit him. Nor would it avail the lord to say that the tenant was not infeoffed by him, and that he claimed nothing in the homage; for as there might be several superior lords, so there might be several tenants one below another; and the chief lord of all held the lowest tenant bound to him by the ties of homage, because he was within his fee, though *per medium*; and when that *medius*, or mesne lord, was taken away for any cause whatsoever, the connection between the chief lord of all and the inferior tenant became immediate; so that, one way or other, the inferior tenant was within the homage of the superior lord.<sup>1</sup> To illustrate this by an instance: if I infeoff *A.* and *A.* infeoffs *B.* and *B.* infeoffs *C.* and so on; then every tenant, from the first to the last, would be my tenants, and I their lord; the only difference being, that the first would be immediate tenant, the others so *per medium*.

We have been showing how the obligation of homage might cease in the person of the lord, and remain in the person of the tenant. In like manner might the homage

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<sup>1</sup> Bract., 80 b.

cease in the person of the tenant and continue in that of the lord: as where the tenant parted with the whole inheritance, and infeoffed another to hold of the chief lord, then the tenant was absolved from the homage; that is, the homage was wholly extinguished as to him, whether the lord consented or not, and commenced in the person of the alienee, who now was bound to the lord; and should the feoffee re-infeoff the feoffor to hold of the same chief lord, the homage of the tenant would thereby be revived. The homage would cease also when the tenant died without heirs, or committed any felony; in which cases the tenement *escheated* to the chief lord. The tie of homage and fealty was likewise dissolved, when the tenant disavowed the services by which he held, or denied that he held of the lord at all; in which case the lord had two remedies: he might either waive the forfeiture of the tenement, and proceed for the recovery of the services; or avail himself of the tenant's default, and demand the tenement by a writ of escheat, or<sup>1</sup> by a writ of right. Should the tenant do any atrocious injury to his lord, or side with his enemy, by giving advice or assistance against his lord (except it was with the king, or the superior lord of all, to whom he had done allegiance), or do anything to the disherison of, or put violent hands on, his lord; all these were breaches of faith which dissolved the homage on the part of the tenant. It must be observed, that homage remained in force between lord and tenant as long as the heirs of both parties continued (which tenure was therefore, in after-times, called *homage auncestrell*); but upon the failure of any of them, the homage ceased, and could be revived in the persons of others only by some new cause. A tenant might decline holding his tenement, and so dissolve the homage: he might, says Bracton, also surrender the tenement and homage to the lord *propter capitales inimicitias*, and so dissolve the homage, that he might be at full liberty to prosecute an appeal against him.

It seems that, in general, the lord could not *attorn*, as they called it, or transfer to another the homage and services of his tenant against his consent, particularly the homage; for by so doing he might subject him to a per-

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<sup>1</sup> Bract., 81.

son who was his declared and inveterate enemy. A slight enmity, however, was not an objection, where the law allowed, as it did in some cases, such an attornment even against the tenant's consent. The most usual way of attorning the homage was, on a fine in the king's court, where the homager was to be summoned to show cause why the homage should not be done to the other person; and if he could not show sufficient reason to the contrary, it would be attorned without his concurrence.<sup>1</sup> There were other instances, where homage might be attorned: as when land was given in marriage; when land was sold for redemption of the lord's person; in both which cases it might be attorned, unless any particular reason could be shown to the contrary. This restraint upon the attornment of homage was founded on other reasons besides those before-mentioned; as homage was the bond by which the tenant claimed the warranty and *excambium* of his lord, it was right that the lord should not have the power of transferring this obligation to another, who might be indigent, and not able to answer the warranty. This restriction was wholly in favor of the tenant, for whose benefit, indeed, homage seemed principally calculated; and if it was just that a lord should not be at liberty to decline the homage of the tenant, it was equally so that he should not attorn it without his assent.

Although the law imposed this restraint as to homage, yet service might be attorned in all cases without requiring the assent of the tenant; and the person to whom it was attorned might distrain for it, without the tenant being able to make any resistance thereto.<sup>2</sup> In such cases, some thought, that should the distress be for the homage and service both, it ought to cease as to the homage, though it held good as to the service; distress being incident to service, and belonging of course to the person who was entitled to the service. Yet a tenant was not to be oppressed by an attornment of service, any more than by an attornment of homage; it was advisable therefore for the tenant, in order to secure himself from any unreasonable demands of his new lord, to get from him a charter, granting that he would not demand more services than were due, and charging himself with a warranty

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<sup>1</sup> Bract., 81 b.<sup>2</sup> Ibid., 82.

and *excambium*, in the same manner as the first lord was bound.

If the lord refused to receive the homage, the tenant had several remedies. In the first place, the service, which the tenant was not bound to do without homage, was lost to the lord; and should homage be forced upon the lord by a judgment of court, the arrears of service were still lost. If the homage was refused publicly by the lord, the tenant might attorn himself to the next superior lord; and if he refused, to the next; and so on to the king, who was the chief lord of all; and if they all refused, the tenant was quit of all demands for service. But should any of them accept it, the immediate lord who had refused it could never recover the homage or service; though he would, on account of his wilful refusal, be still bound to warranty, notwithstanding the person to whom tenant did homage had the service.<sup>1</sup>

When a mesne lord had accepted the homage and fealty of his tenant, and received the service, but had applied it to his own use without acquitting him from the demands of the superior, and this was proved in the presence of good and lawful men: he might, in future, without any breach of law, satisfy the chief lord with his own hands, by doing his service to him; and yet the mesne lord would not on that account be discharged from his warranty.<sup>2</sup> The remedy against the mesne lord, in such cases, was by a writ *de medio*.

After homage was performed, the next thing for the heir to do was to pay the relief; so called, says

Relief.

Bracton, because thereby the tenement and inheritance which was in the hands of the ancestor, *et quæ JACENS fuit per ejus decessum*, *RELEVATUR in manus hæredis*. The sums to be given on these occasions were settled by *Magna Charta*,<sup>3</sup> except in tenure by serjeanty, which was still left to the discretion of the lord.<sup>4</sup> A relief was to be paid only in cases of succession, and never upon a change of tenant by buying or selling, or any other sort of purchase.<sup>5</sup> It was to be paid to the next immediate lord; and no other: it was to be paid only once, and not upon the change of the lord; for though homage might be done several times, relief was to be paid only once;<sup>6</sup> so that

<sup>1</sup> Bract., 82 b.

<sup>2</sup> Ibid., 84.

<sup>3</sup> *Vide* vol. i., 470.

<sup>4</sup> Bract., 84.

<sup>5</sup> *Vide* vol. i., 242.

<sup>6</sup> Bract., 84 b.



the doubts expressed by Glanville on this head no longer existed.<sup>1</sup> Another gift was to be made to a lord by the heir when he succeeded his ancestor, which was called a *heriot*. This was, however, in nothing like a relief: for it was given by all tenants, as well villain as free, and it rather came from the deceased than the heir: it was, says Bracton, when a man remembered his lord by the best beast, or second best beast he died possessed of, according to the custom of different places, and was rather *de gratiâ* than *de jure*; and, in fact, it related not at all to the inheritance.<sup>2</sup>

The subject of ward and marriage is treated by Glanville, and by Bracton, principally in the same way, and sometimes in the same words; we <sup>Of wardship and marriage.</sup> shall therefore touch upon such parts only as are stated somewhat differently, or are discoursed upon more at large by Bracton.

The age of female wards was contended by some to be at fifteen years complete, both in military and socage tenure; for, as to the former, they said that she might have a husband who was able to perform the military service;<sup>3</sup> and therefore she might, with propriety, be reckoned of age before she was twenty-one years of age. But this opinion is combated by Bracton, who says, that the same principle might make her of age at an earlier period; and he therefore lays it down, that there is no distinction between male and female wards in the respective tenures; and that it was only in the latter that females, (as we have before shown of males,) were to be considered as of age at fifteen years; at which time, says Bracton, a woman is able to manage her domestic concerns;<sup>4</sup> which is a similar description to that given by Glanville,<sup>5</sup> and adopted by Bracton, of the qualification of an heir in burgage-tenure: and the latter author mentions fifteen as the proper age for the infancy of a tenant in socage to cease, because he was then able to attend to affairs of agriculture.

<sup>1</sup> Vide vol. i., 381.

<sup>2</sup> Bract., 86.

<sup>3</sup> Bracton says, another reason was given in favor of this early liberation from pupillage: *Fœmina magis doli capax est quam masculus, et maturiora sunt vola mulieris quam viri.*

<sup>4</sup> To this Bracton adds, that she might *habere* COLNE *et* KEYE; which is thus explained by Spelman: COLNE *Saxonice* est CALCULUS; KEYE, CLAVIS; *quasi ed spectaret hic locus, ut fœmina congruæ ætatis haberetur, si COMPUTUM et CLAVES domesticas vateret curare.* Spelman, *voce.* Bract., 86 b.

<sup>5</sup> Vide vol. i., 367.

It is laid down positively by Glanville, that if a person married his daughter and heiress without the assent of his lord, he should forfeit his inheritance; and that a widow who married without her lord's assent, should in like manner forfeit her dower.<sup>1</sup> These two points are recognized by Bracton as remnants of the old law, which had gone out of use. We have before seen what notice was taken of this cruel piece of law by *Magna Charta*; and it was now laid down by Bracton, that in both cases the lord was only entitled to a penalty; the measure of which, however, he does not mention.<sup>2</sup>

When an infant succeeded to inheritances that were held of different lords, the custody of the lands belonged to the respective lords of whom they were held; but the custody of the heir's person, and the marriage, which was the great source of emolument to the lord, could belong to one only; and there was some difficulty in ascertaining who that person should be. It is laid down generally by Glanville, that this should be the chief lord of whom the heir held his first fee;<sup>3</sup> and that the king, by his prerogative, was entitled to certain preferences. The manner in which both these claims were adjusted is more fully explained by Bracton.

As an exception to the prerogative, which gave to the king the custody of the heir and his lands of whomsoever they were held by knight-service, it is laid down, that if any held of the king *per feodi firmam*, or in socage, or in burgage, or by *serjeanty*, to perform the service of finding him knives, or darts, or the like, the king should not have custody either of the heir, or of the lands he held of any one else; nor if he held of the king as of an honor or escheat; it being provided by *Magna Charta*,<sup>4</sup> that the tenure in such case should remain the same as it was when in the hands of the former possessor; though, even in case of escheats, if the heir held under a new grant from the king, the king's prerogative to wardship would prevail. This prerogative of the king, therefore, prevailed in respect only of a tenant who held of him *in capite* by military tenure, or by *serjeanty* to attend the king's person; and it only extended to subject lands held by military tenure to the ward of the crown.<sup>5</sup>

In socage-tenure the wardship belonged to the next of

<sup>1</sup> *Vide* vol. i., 370.

<sup>2</sup> Bract., 88.

<sup>3</sup> *Vide* vol. i., 369.

<sup>4</sup> *Ibid.*, 238.

<sup>5</sup> Bract., 87 b.

kin, and not to the lord ; and therefore, in general, if an heir had inheritances held in socage of different lords, there could arise no question about priority of feoffment, to ascertain the right of wardship, as in military tenures ; though it is said by Bracton, that by special custom in some places, and amongst others in the bishopric of Winchester, the lord had the wardship in socage-tenure, and in such cases, recourse must of necessity be had to priority to determine who was chief lord ; yet this preference was only against lords whose tenures lay within the reach of the custom, and not against other persons.<sup>1</sup>

The first fee, in many cases, which constituted a person chief lord, and gave him the priority, was the fee that was first *delivered* to the heir. The lord was not to receive homage before he had *delivered* the inheritance to the heir: the wardship and marriage could not be demanded from the infant heir, any more than relief, or any service could from the heir of full age, before homage ; the delivery, therefore, of the inheritance was the first step towards acquiring a right to the wardship and marriage, and the receiving of homage completed the claim. It follows from hence, that as long as the homage of the ancestor had continuance, no delivery was to be made of the inheritance, and that homage continued during the ancestor's life, unless he had made any transfer of the land which broke the homage. Every transfer had not that effect. Thus, if a person holding by military service and homage, granted the land to his son and heir for life, to hold either of himself or of the chief lord, the homage still continued between the father and the chief lord ; but it would have been broken, if the father had parted with the whole inheritance.

The ceasing of the homage and the delivery of the inheritance will be better understood by considering the following cases. Suppose *A.* having an inheritance, married *B.* having one also ; both held of the same lord. They have a son. *A.* dies, leaving his wife *B.* alive: the inheritance of *A.* might be delivered to the heir by the lord, who would, in consequence, be entitled to homage, ward, and marriage. But if *B.* the wife had died, leaving *A.* alive, it would be otherwise ; because the homage done

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<sup>1</sup> Bract., 88.

by A. in the name of his wife still continued; for it could not be dissolved during his life, as he was entitled to hold the land *per legem Angliæ*: the heir of A. therefore continued in the power of the father, during whose life he owed no homage to the lord; as two homages could not be done for the same land. And so it was, wherever the heir was descended both from the husband and wife; but it was otherwise, where there was a second marriage, and he was descended only from one. As for instance, if the wife only had an inheritance, and the husband died first, leaving an heir, the inheritance could not be delivered during the life of the wife; and of course the lord would not have wardship and marriage: so if she married one or more husbands, there was still to be no delivery; and, of course, no ward or marriage, as long as she or any of her husbands lived: the same, if the wife died, leaving any husband alive: but as soon as the surviving husband died, then the inheritance might be delivered to the heir of the deceased wife by her first husband, and ward and marriage would follow.

Thus, as the preference depended upon the delivery of the inheritance, and that upon the death of the person in seisin, it might happen that the death of the husband and wife might fall so near as to leave a difficulty in determining which died first. In such case they used to recur, as in Glanville's time, to the first feoffment, and disregard the priority of delivery; and so they did, when the inheritance on the part of the father and that on the part of the mother were held of different lords, and were united in the person of one heir.<sup>1</sup>

The guardian in socage had the marriage of the heir and all other casualties and profits of wardship the same as the guardian in military tenure; and what is very remarkable, the right of the guardian in socage was so much considered, that the law allowed the *apparent* next of kin to take, notwithstanding he was a bastard and illegitimate.<sup>2</sup> This made a guardianship in socage as great an object as that in military tenure; and the struggle for the marriage of the heir did not lie only between the different lords of whom he held in military tenure, but, if he also held any socage lands, there might be a contest

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<sup>1</sup> Bract., 89 b.

<sup>2</sup> Ibid., 88.

between the lord in military tenure, and the person who was entitled to be guardian in socage. When, therefore, land in military tenure descended from the father, and land in socage from the mother, or *vice versâ*, and they both centred in the same heir, the marriage of the heir was decided, says Bracton, by priority, in the manner before-mentioned.<sup>1</sup> But if lands in socage and in military tenure descended from the same ancestor; then, notwithstanding the socage might be of the prior feoffment, yet the privilege of military tenure prevailed, and the lord of those lands would exclude the next of kin, and have the ward and marriage.<sup>2</sup>

Thus was the person of the infant heir made a property of, either by his guardian in chivalry or in socage: the disposal of the heir in marriage might be sold to the best purchaser, like the fruits and profits of his lands. We shall soon see,<sup>3</sup> that the legislature made some provision against this oppression, in the case of guardians in socage; but the others were rather secured in their rights by another provision of this reign, which made void all conveyances of the inheritance to the heir in the life of the ancestor; a practice by which tenants in chivalry endeavored to avoid the claim of ward and marriage.<sup>4</sup>

Having considered the terms and conditions on which landed property might be held, the next object which naturally presents itself is, the manner Of gifts of land: of acquiring a title to property: and this was of three kinds; by *gift*, by *succession*, and by *will*. We shall consider these three in their order, beginning with the first.<sup>5</sup> A gift of land might be considered in various ways; either as, what is called by Bracton, *libera et pura donatio*, or that which was *sub conditione*; and, in another respect, such as was *absoluta et larga*, or that which was *stricta et coarctata* to certain particular heirs, with an exclusion of others. These will be treated of more minutely hereafter, when we have first inquired what persons were capable of making gifts of land, and what not.

The person who was regularly and properly entitled to make a gift of his land, was he who was seized in fee; but yet some others who had an inferior By whom: interest, could, to a certain degree, make a gift; as any

<sup>1</sup> Bract., 88 b.<sup>3</sup> Stat. Marl.<sup>5</sup> Bract., 10 b.<sup>2</sup> Ibid., 91.<sup>4</sup> *Vide post*, Stat. Marl.

one who had a freehold, though only for life; and even such as had no freehold; as one who had a term for years, or the wardship of land: and indeed those who had no lawful title; as one who was in seisin by intrusion or by disseisin, might, says Bracton, convey a freehold, though it was not a complete and indefeasible one. A gift made by a minor, or a madman, would be good, if confirmed, after the one was of age, and the other had become of sane memory.<sup>1</sup> Those who could not make a gift, were such as had not a general and free disposal of their property: such was the condition of minors, who were *sub tutelâ vel curâ*; yet these could accept a gift with consent of their tutor, as the law allowed them to meliorate their condition, though not to lessen it by making a gift, even with consent of their tutor: the same of a person deaf and dumb; a person taken prisoner by an enemy, while in the enemy's custody; or a leper removed from the converse of mankind. Others were incapacitated *sub modo*. Thus archbishops, bishops, abbots, and priors, could not make gifts without the assent of the chapter; nor the chapter without the assent of the king, or other patron, whoever he might be; the concurrence of all whose interest was concerned being absolutely requisite. Rectors of churches, as they possessed nothing but in the name of their churches, could make no alienation thereof but by consent of the bishop or patron;<sup>2</sup> nor even make any change therein for the better.<sup>3</sup> Bracton lays it down, that a bastard could not give his land unless he had heirs of his body, or he had made lawful assigns thereof, conformably with the terms of the donation. This restriction on the alienation of a bastard seems to have been imposed in favor of the lord, who, as the law now stood (though it was otherwise in Glanville's time), would, on failure of heirs, succeed by escheat. For a similar reason no one charged with felony could alien his land with effect, though the gift would hold *till* he was convicted, and if he was acquitted would be valid. All gifts between a husband and wife were void;<sup>4</sup> nor could a husband give his land to another, to be conveyed by the donee to his wife in his lifetime, or after his death, as that would be a fraud upon the letter of the law.

<sup>1</sup> Bract., 11 b.

<sup>2</sup> So Bracton reads. Quere, if it should not be *and*? <sup>3</sup> Bract., 12.

<sup>4</sup> *Vide* vol. i., c. 3.

Thus far of the persons who might make a gift of land; next of those *to whom* a gift may be made. A gift, as has been before said, might be made to <sup>To whom.</sup> a minor; and in such a case, a *tutor*, or *curator*, used to be appointed to accept and take care of such gift; but the law did not allow the feoffor to appoint such tutor;<sup>1</sup> for that, says Bracton, would seem like a continuance of the seisin, instead of making a feoffment of it. A gift might be made to a Jew, unless the original charter had a clause which forbid such an alienation; it being very common in those days to add to the clause of assignment *exceptis viris religiosis, et Judæis*: it seems that Jews were not by law incapacitated from taking gifts of land, except in these particular cases.<sup>2</sup> If a gift was made by a man to his wife and his children, or her children begotten of another husband, the gift, though void as to the wife, would hold as to the others.

It has before been said, that a person might give what he had in fee for life, or for years; to which may be added, that he had this power, whether he was seized to himself solely or in common with another. He might also give that which he had in expectancy after the death of his ancestor who held it in fee. He might give what he had granted before to another for a term of years, with a saving to the farmer of his term; because these two possessions could very well consist with each other, so as one should have the freehold and the other the term.

It has before been shown that these gifts might be of greater or less extent and duration; they might be in fee for life, in fee-farm for term of life or for term of years. Where a gift was for life, whatever the circumstances might be, the donee had immediately *liberum tenementum*, or, as it has since been called, a *freehold interest*, so as to have an assize if he was ejected; and such a donee might, as has before been said, make an imperfect donation in fee or for life; so great consideration did the law bestow on a freehold of any sort.<sup>3</sup>

To ascertain that gifts were actually made by the parties

<sup>1</sup> Bract., 12 b. It is to be regretted that Bracton has not informed us by whom he was to be appointed.

These terms of *Tutor* and *Curator* are borrowed from the civil law, and the appointment of them to protect property given to an infant is adopted from the same source. (Inst., lib. i., tit. xiii., *et sequent.*)

<sup>2</sup> Bract., 13.

<sup>3</sup> Ibid., 13 b.

whose names were to the deed of gift, and that they were in a capacity to manage their affairs, a writ was framed requiring the sheriff to make inquisition whether the donor was *compos sui*; which writ was either to be executed before the sheriff and guardians of the pleas of the crown, or before the justices at Westminster.<sup>1</sup> There was another writ to inquire if it was the donor's seal, or was really affixed to the charter by him; and if, upon inquiry, any one was charged with a fraud respecting the gift, he was summoned to answer for it.<sup>2</sup> All gifts should be free, and without compulsion: and therefore, should it be proved that any coercion was used with the donor, the gift was revoked; but if the donor dissembled the force, and did not complain of it till some length of time, he would not be permitted afterwards to invalidate the gift by such a suggestion. If it was in time of war, he was to make a declaration thereof as soon as peace was restored; if in time of peace, then, says Bracton, as soon as he had escaped from the duress, he was to raise a hue and cry after the parties; and in either of these cases, he would be considered by the law as having done all in his power.<sup>3</sup>

Having premised these observations concerning the capacity of persons to become donors and donees, the next subject is the donation itself. It has been said that donations were, some of them, simple and pure; that is, where no condition or modification was annexed. The following is a pure and simple gift of land, and, as it was the common form of gifts or feoffments at this time, is very well worthy of notice: *Do tali tantam terram in villâ tali, pro homagio et servitio suo, habendam et tenendam eidem tali et hæredibus suis de me, et hæredibus meis tantum, ad tales terminos, pro omni servitio, et consuetudine seculari, et demandâ; et ego et hæredes mei warrantizabimus, acquietabimus, et defendemus in perpetuum prædictum talem, et hæredes suos, versus omnes gentes per prædictum servitium, etc.* A gift like this, *tali et hæredibus suis*, was to be understood in the large sense of the term *hæres*, and as comprehending all heirs both near and remote.<sup>4</sup> Another way of enlarging this clause was *tali et hæredibus suis, vel cui terram illam dare vel assignare voluerit*, with a clause of warranty co-extensive with such a donation. In such case, if the donee assigned

<sup>1</sup> Bract., 14 b.<sup>2</sup> Ibid., 15.<sup>3</sup> Ibid., 16 b.<sup>4</sup> Ibid., 17.



and died without heirs, the donor was bound to warrant the assignee, which could not be without such an express engagement in the deed of gift, so that the express mention of assignees seemed necessary to give a complete power of alienation.

As a gift might be made largely, so it might, as before stated, be *coarctata*, and confined to particular heirs, as *tenendam sibi, et hæredibus suis* QUOS DE CARNE STA ET UXORE SIBI DESPONSATA PROCREATOS HABUERIT; or, *tali et uxori suæ*, or *cum tali filiâ meâ*, etc., *tenendam sibi et hæredibus suis de carne talis uxoris, filiae exeuntibus*, etc. In these cases the inheritance descended to the particular heirs there specified, to the exclusion of all others. If a person so infeoffed should infeoff any other, the heirs would be bound to warranty; for though some had endeavored to maintain that they took together with their ancestor, yet Bracton denies it, and says, they only took by descent. And should the person so infeoffed have no such heirs, or they should fail, the land would revert to the donor by a tacit condition, without any mention thereof in the gift.

The construction of law upon the estate and interest of such donees was, that, in the first of the above cases, should there be no heir, the land given would be a freehold in the donee, but not a fee; in the second, it would be a freehold till heirs were born, and then it would become a fee; and when they failed, it would again become only a freehold. Thus, we see, it was at the pleasure of the donor, at the creation of the gift, to modify it as he pleased, however contrary to the general disposition the law would make thereof; in which instances the maxim, that *conventio vincit legem*, was the principle which governed; and this was not only in prescribing what heirs should inherit, but also in the service to be performed, which, as has been seen before, was in the breast of the feoffor to order as he liked, so as he warranted his tenant against the chief lords.<sup>1</sup>

We have hitherto spoken of the heirs that were pointed out by the will of the donor to succeed to the inheritance. We shall next take notice of the Of conditional gifts. conditions and modifications under which the inheritance was to be enjoyed; and these imported sometimes a burden, sometimes a benefit, to the donee, and were of different

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<sup>1</sup> Bract., 17 b.

kinds. Thus a gift might be *tenendum sibi et hæredibus suis, si hæredes habuerit de corpore suo procreatos*; where, if the donee had heirs of his body, though they afterwards failed, yet he had satisfied the condition, and all his heirs, without distinction, became entitled to inherit; but if no such heir had been born, the land given would have been only a freehold, and would return to the donor, to the exclusion of the heirs general, because the condition had not been fulfilled. If a gift was *viro et uxori, et hæredibus uxoris*; or, *vira et uxori, et hæredibus viri*; or, *viro et uxori et hæredibus communibus, si tales extiterint, vel si non extiterint, tunc ejus hæredibus qui alium supervixerit*; these were all *sub modo*. Others were *sub modo*, and also *adjectâ conditione*; as, *Do tali tantam terram, ut det mihi tantum*; or, *ut mihi inveniatur necessaria*. These gifts, though not wholly gratuitous, yet, Bracton says, were *simplex et pura*; and if livery was given thereon, they could not be revoked, though the condition was not performed, unless there had been an express covenant entitling the donor to enter for breach of the condition.<sup>1</sup>

The limitation of estates went much further than what has yet been stated. A person would make a gift to his eldest son *A. tenendum sibi et hæredibus suis de corpore suo procreatis*; and if he had no such heirs, or they should fail, then to his second son *B.* to whom he directed it to revert, to have and to hold to him in the same manner; and upon like failure to *C.*, his third son, in the like way, and so on; and if the said *A. B.* and *C.* all died without such heirs, the land to revert to the donor and his heirs; which last was unnecessary, as the law would, of course, give the reverter to him. Other gifts were as large as the former was confined: as *tenendum tibi et hæredibus tuis, vel cui dare, vel assignare in vitâ, vel in morte legare volueris*. A regard to the will of the donor induced them to support such gifts; for Bracton lays it down, that if the legatee got the seisin, and an assize was brought against him by the heir, he might plead the form of the gift, and it would be a bar,<sup>2</sup> so that the restraint upon gifts of land by will, which seemed one of the strictest points in the law of landed property, might be dispensed with by the special form of the original gift.

Innumerable were the conditions upon which gifts might

<sup>1</sup> Bract., 18 a, b.

<sup>2</sup> Ibid., 18 b.

be made. Some of these were conditions precedent, and some subsequent, to the vesting of the estate given; some of them were supported by law, and some not: and various were the reasons given why they should not be supported. A few instances of this kind will serve; as, *Do tibi talem terram, si Titius voluerit; si navis venerit ex Asiâ; si Titius venerit ex Jerusalem; si mihi decem aureos dederis; si cælum digito tetigeris*, and the like;<sup>1</sup> some of which were accompanied with an express condition of reverter on failure in performing the terms on which the gift was made, and some not.

The course of descent was entirely under the control of the donor in making the gift. A gift was sometimes made to a person for a term of years, and after that term to revert to the donor, with an agreement that if the donor died within the term, the land should remain to the donee for life, or in fee, as it might happen. Thus a freehold and fee might be raised by a condition, and in the same manner might be changed into a term; for when a gift was made for life, it might be added as a condition, that, should the tenant die within a certain time,<sup>2</sup> his heirs, tenants, assigns, or executors should retain the land for a certain term after his death. When land was given to a creditor *in vadium*, it was sometimes agreed, that if the money was not paid at an appointed day, he should hold it to him and his heirs. Gifts were often made for a term of years, yet so as to be restored to the donor if he ever returned into the kingdom; but if he died in his voyage, or did not return, to remain to the termor in fee; upon the performance of which condition the term ceased, and the fee commenced.<sup>3</sup>

In all gifts *in maritagium*, or to a *bastard*, there was an express or tacit condition of reverter. If land was given to a bastard in marriage with a woman, it was always either to them *et hæredibus eorum communibus*, or, *hæredibus ipsius uxoris tantum*. In the former case, there was, by a tacit condition in the gift, a reverter to the donor, upon failure of common heirs; in the latter, if she had heirs by the bastard, the land went to them; if she had none, it descended to other heirs of the wife, whether born of another husband or collateral. Suppose land was given

<sup>1</sup> Bract., 19.  
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<sup>2</sup> Ibid., 19 b.

<sup>3</sup> Ibid., 20.

to a bastard solely, without his wife, *ei et hæredibus suis*, or, *ei et assignatis suis*; in the former case, upon failure of heirs, whether homage had been done or not, the land, contrary to the usage in Glanville's time,<sup>1</sup> escheated for want of heirs; in the latter, if he had made an alienation, it was good, though there was a failure of heirs.<sup>2</sup> If a bastard had a brother, that brother could not take from him by descent.

Land was sometimes given before the espousals by some relation of the wife to the husband with his wife, or to both of them; as, *tali viro et uxori suæ, et eorum hæredibus*, or *alicui mulieri ad se maritandum*, or simply without any mention of marriage; but if there was mention of marriage, then the land so given was called *maritagium*. A *maritagium* used to be given either before, or at the time of, or after, the matrimonial contract. *Maritagium* was, as has been said before,<sup>3</sup> of two kinds, it was *free*, or *not free*; the particulars of which distinction were now more minutely set forth than in the time of Glanville. *Liberum maritagium* was, where the donor was willing that the land should be quit and free from all secular service<sup>4</sup> belonging to the lord of the fee, so as to perform no service down to the third heir inclusive, and the fourth degree. The degrees were computed in this way: the donee made the first, his heir the second, his heir the third, and the heir of the second heir the fourth. The heirs were computed thus: the son or daughter of the donee was the first, the son or daughter of them the second, and their son or daughter the third, which third heir was to do homage and perform the service. As there was a reverter to the donor, on failure of heirs, there was to be no homage in these gifts; but should those in the right line fail, the land would go to the remoter heirs, if the form of the gift allowed it.<sup>5</sup>

These gifts were made in different ways. If land was given *tali filix meæ ad se maritandum*, without mention of heirs, this conveyed only a freehold and not a fee; and therefore, after the death of the wife, it reverted to the donor; nor had the husband any claim upon it *per legem Angliæ*.<sup>6</sup> If it was *ad se maritandum, et tenendam sibi et hæredibus suis*, generally; then, though she had no heirs of her body, the remoter would be called in, and the

<sup>1</sup> Vide vol. i., 374.

<sup>2</sup> Bract., 20 b. Vide ante.

<sup>3</sup> Vide vol. i., 375.

<sup>4</sup> Bract., 21.

<sup>5</sup> Ibid., 21 b.

<sup>6</sup> Ibid., 22 b.

husband would possess it *per legem Angliæ*. If it was confined to particular heirs, it reverted on failure of such heirs. Thus, if it was to the common heirs of the husband and wife, and they had a daughter, and the husband died, and the widow married again and had a son, the daughter would be preferred to the son; though it would be otherwise had the gift been to the wife only, and the heirs of *her* body.<sup>1</sup>

The right of a husband to retain the land of his deceased wife *per legem Angliæ*, is defined by Glanville and Bracton in the same manner, Estates by  
courtesy. except that the former<sup>2</sup> states it as if confined to estates given with the woman *in maritagium*; if so, this claim had now extended itself, for Bracton says, the husband should have the land if he married a woman *habentem hæreditatem, vel maritagium, vel aliquam terram ex causâ donationis*, having any inheritance, whether a *maritagium* or other gift of land.<sup>3</sup> He agrees likewise with Glanville, that the second husband was equally entitled with the first. It seems, one *Stephanus de Segrave*, whose name we find among the justices itinerant in this reign, had written a treatise, in which he had combated this opinion, as founded on a misconception of the meaning and design of this sort of estate. He thought there was an injustice in giving an estate *per legem Angliæ* to the second husband, more especially when there were children alive of the first marriage.

The crying of the child, which was a necessary circumstance towards establishing a title to this estate, was to be proved *per sectam sufficientem*, consisting of persons who heard with their own ears the cry, and not by those who had it by hearsay. The cry was only an evidence of the child being born alive; but this evidence was more regarded than any testimony of midwives or nurses, who might be induced, by various motives, to give false testimony; and no proof of the child being born alive, and christened as such, would be received in lieu thereof. So rigid were the lawyers of those days in exacting this only proof of life, that where the child was born deaf and dumb, they pronounced *tamen clamorem emittere DEBET, sive masculus sive femina*; which expectation had been thrown

<sup>1</sup> Bract., 22 b.<sup>2</sup> *Vide* vol. i., 358.<sup>3</sup> Bract., 437 b.

by the lawyers of those days into a singular monkish verse.<sup>1</sup> If the child was a monster, and instead of a *clamor* uttered a *rugitus*, as Bracton expresses it, it would not satisfy the requisite of the law, much less would a birth that was supposititious.<sup>2</sup>

The tenant *per legem Angliæ* was to have all incidents that happened, whether in services, wards, reliefs, or the like, during his life; but if any land, or inheritance, fell in after the death of the wife, such accession went to the heir, if of age; if not, to the chief lord who had custody of him; as likewise did the wards and the like; it being a rule, that the husband should retain nothing that did not accrue in the lifetime of the wife.

Among other impediments to the husband claiming this estate, Bracton reckons that of having *machinatus in mortem uxoris*; and this, he says, would be a good plea to bar him of his right. If no heir was born of the marriage, and the husband held possession by force, after the death of the wife, the next heir might have the following writ, which is recorded to have been framed for one *Ranulphus de Dadescomb* by *W. de Ralegh*, a name often found among the justices of this period. *Rex vicecomiti salutem. Ostendit nobis A. quodd cum B. et C. uxor egus tenuissent tantam terram, etc., ut jus, et hæreditatem ipsius C. quæ nuper obiit sine hærede de corpore suo procreato (ut dicitur), unde terra illa descendere debuit ad prædictum A. sicut ad propinquiorem hæredem ipsius C. quia prædicta C. sine hærede de corpore suo procreato decessit; idem B. post mortem prædictæ C. uxoris suæ contra legem et consuetudinem regni nostri cum vi suâ se tenet in eâdem, ita quodd prædictus A. in prædictam terram, ut in jus et hæreditatem suam, ingressum habere non potest. Et ideo tibi præcipimus, quodd si prædictus A. fecerit te, etc., tunc summoneas, etc., prædictum B. quodd sit coram justitiariis, etc., ostensurus quare deforceat eidem A. prædictam terram, et habeas ibi, etc.,*<sup>3</sup> which seems to be the most simple form of a writ of entry; a species of writs which had lately grown into vogue, and of which more will be said in the proper place.

Having said thus much of estates which reverted to the donor upon a condition expressed or implied, it may

<sup>1</sup> The verse is as follows:

*Nam dicunt e vel a quotquot nascuntur ab Eva.*

<sup>2</sup> Bract., 438.

<sup>3</sup> Ibid., 438 b.

be requisite to consider the effect and consequence of such a reverter or reversion. The reversioner, says Bracton, was considered neither *pro hærede* Of reversions. nor *loco hæredis*; nor was he bound to warrant anything done by the donee, except the appointment of dower; and this only where the donation was pure, without any condition or modification whatever. Land reverted not only for a failure of heirs or assigns; but in case of felony committed by the tenant, which threw a perpetual impediment in the way of descent; in which instance, it might happen that the donor had made a reservation of the services to himself, which made him lord, and then he took it as an escheat. In such case, he was deemed *in loco hæredis*, and was accordingly bound to warrant whatever was completed by the donee before the felony; as any gift or demise for a term, provided the act was complete; for if it was not, as, from the nature of the thing, was the case in dower, it would not avail after a conviction for felony: nor was the donor, though he came *in loco hæredis*, bound to warrant it.<sup>1</sup>

We have hitherto been speaking of estates given to a man and his heirs; but land was sometimes Gifts ad terminum. given *ad terminum* or *ad tempus*, for a term; as for a<sup>2</sup> term of life, or years; that is, the life of the grantor, or grantee: or for a time; as where a gift was "till provision was made for the donee." In gifts of this kind it was important whether there was only mention that the donor should make provision, without saying anything of his heirs, or both the donor and his heirs were included; and whether it was to be for the donee only, or the donee and his heirs. If the donor's heirs were not included, and no provision was made in the life of the donor or donee, the land remained in fee to the donee; but if provision was made in their lives, the land reverted to the donor by the form of the gift. If the heirs of the donor only were included, and not those of the donee, and neither the donor nor his heirs provided for the donee in his life, the land remained to the donee and his heirs in fee, although the heir of the donor or the donor himself was ready to provide for the heirs of the donee, after the do-

<sup>1</sup> Bract., 13.

<sup>2</sup> This was called a holding *ad firmam*, and the persons so holding were called *firmani*. *Fermo*, in the Italian, signifies a bargain or contract.

nee's death. But if, on the other hand, the heirs of the donee and those of the donor were mentioned, and the donor provided for the donee, or his heirs, the land reverted to the donor; and should the donor have made no provision in his lifetime, it was not sufficient that his heirs were ready to do it, because the form of the gift required it to be otherwise. If there was no mention of heirs at all, then should the donor make no provision for the donee during their joint lives, the law was, that the land should remain in fee to the donee. If land was given for the life of the donee, and not of the donor, nor in fee, then it was considered as a freehold in the donee: if the reverse, then the law considered it as the freehold of the donor, and not of the donee, because it might, if the donor died first, be revoked in the life of the donee, and revert to the heirs of the donor. Again, if a gift was made for the life of the donor to the donee and his heirs, then, should the donee die first, his heirs would hold it for the life of the donor, and they could recover in an assize of mortancestor, stating that their ancestor died seized *as of fee*:<sup>1</sup> and if the donor died first, then, for the reason above given, it became the freehold of the donor and not of the donee. If there was no mention of heirs of the donee, yet the land needed not immediately, in such case, revert of course to the donor; for the donee might, if he pleased, make a testament of it, as of any chattel; and such a will, according to Bracton, was good in law.

If a gift was made by a man for him and his heirs without naming the heirs of the donee, and without saying expressly it should be for life, yet the land became the *freehold* of the donee as long as he lived. But should a gift be made *ad terminum annorum*, for a term of years, however long, even though it exceeded the usual length of man's life, yet the donee did not by such a gift obtain a *freehold*; because a term of years was a certain and determinate period, and the term of life uncertain; the uncertainty of the determination of the estate being what Bracton seems to consider as absolutely necessary to constitute a freehold interest. A term of years was treated as an interest that did not at all impede any further disposition of the land so held; for the person who let it,

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<sup>1</sup> Bract., 26 b.



might within the term make a gift of the land to another, or to the same person in fee. If it was to the farmer, one sort of possession would thus be changed into another; if to another, the possession of the farmer would still remain unimpaired; for a term and a feoffment of the same land might consist very well together. In such case, there would be different and distinct rights. To the feoffee would belong the property of the fee and the freehold; the farmer could claim nothing but the usufruct—that is, to enjoy the use and produce freely during his term, without any obstruction from the feoffee.

Land, says Bracton, might be given *at the will* of the giver, and so on as long as he pleased, *de termino in terminum*, and *de anno in annum*; under which lease the person taking had no freehold; the owner of the *proprietas* could at any time reclaim it, as being nothing in law but a precarious possession (a).<sup>1</sup>

Another sort of gifts was to cathedral, conventual, and parochial churches, and religious men. These were said to be *in liberam eleemosynam*. They were sometimes *in liberam et perpetuam eleemosynam*; in which cases, the donee was not excused from the burden of service: but if the gift was what they termed *in liberam puram, et perpetuam eleemosynam*, then he was; and the donor and his heirs were bound to warrant the donee against all claims of the chief lord.<sup>2</sup>

The next subject is the consideration the law had of the several before-mentioned gifts; all which were imperfect, till possession or seisin was given Livery. to the donee. The degrees of possession made a subject of very minute distinction and refinement at this time, and

(a) This is mere verbal quibbling on the part of Bracton, evidently with a view to the controversies of the age as to the control of the crown over bishoprics. No such distinction is drawn in Glanville, who states broadly that the bishops held their baronies in frankalmoigne (lib. vii., c. 1). So the *Mirror* says that when lands were originally allotted, some received their lands without any obligation of service, as frankalmoigne (c. 2, s. 28). So Littleton, writing *temp.* Henry VI., says that where a man gave lands to an abbot, etc., to hold to them and their successors (whether he said in pure and perpetual alms, or in “free alms,” or in frankalmoigne), the land would be held in frankalmoigne, evidently meaning that the essence of it was a gift to the ecclesiastical person and his successors, which is common sense. It is not likely that men would ever draw such senseless distinctions as Bracton here affects to draw. Littleton says distinctly that tenants in frankalmoigne owe no service to their lords. And that was the law laid down by Glanville.

<sup>1</sup> Bract., 27 b.

<sup>2</sup> Ibid., 27 b.

is discoursed on by Bracton<sup>1</sup> at length. It is sufficient to say, that the completest possession which could be had, was, when the *jus*, and *seisina*, the title to the land, and the seisin of it, went together; for the donee had then *juris et seisinæ conjunctio*; the highest of all titles.<sup>2</sup> But this could not be obtained without a formal *traditio*, or *livery*; for land was not transferred by homage, nor by executing charters or instruments, however publicly they might be transacted, but by the donor giving full and complete seisin thereof to the donee, either in person or by attorney. This was by publicly reading the charter (and if livery was made by attorney, by reading the letters of attorney) in presence of the neighbors, who were called together for that particular purpose; upon which the donor retired from the possession, both *corpore et animo*, without any intention of returning to it as lord; and the donee was put into the vacant possession, *animo et corpore*, with a resolution of retaining possession; in short, one party ceased, and the other began to possess it: for the donor never ceased to possess till the donee was fully in seisin; it being a rule of law, that the seisin could not remain vacant for the minutest space of time. This is the account given of livery by Bracton, who adds this definition of it: *de re corporali de personâ in personam de manu propriâ vel alienâ* (that is, of an attorney) *in alterius manum gratuita translatio*. And if livery was thus made by the true owner of the land, the donee had immediately the freehold by reason of the *juris et seisinæ conjunctio*.<sup>3</sup>

There were some cases where livery was not necessary, and any expression of the owner's will, that the property should be changed, had the same effect as livery. Thus, where land was let for a term of life, or years, and afterwards the donor sold or gave it wholly to the donee, it became the property of the donee immediately: the same where a person was in possession by disseisin or intrusion;<sup>4</sup> the law allowing, in these cases, a fiction to supply the fact of the land having really passed out of one hand into the other.

When a livery was made, it had the effect of conveying to the person to whom it was made, everything the maker of it had: whether he had a mere right and property of

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<sup>1</sup> Bract., 38 b.

<sup>2</sup> Ibid., 39 b.

<sup>3</sup> Id., *ibid.*

<sup>4</sup> Ibid., 40 b.

the fee, a freehold, or usufruct, it all belonged to the donee. But for this purpose, it was not sufficient that the donee came into the occupation of part of the land; for if any person belonging to the donor remained on another part, he thereby retained the whole, notwithstanding the livery: and it was absolutely necessary towards completing the livery that the donor and every one belonging to him should leave the land. If the person making livery had only the usufruct, yet he thereby gave to his feoffee a freehold, as far as concerned himself, and all others who had no right, though *not* as against the true owner. If he had nothing, nothing he could give; yet if a person was only in possession, let that be as inferior as might be, it is clearly laid down by Bracton, that he could give a *precarious* fee and freehold by livery.<sup>1</sup> As livery might be made either by the donor in person or his attorney, so it might be accepted either by the donee or by his attorney.<sup>2</sup>

Land might be transferred not only by a legal title, and livery thereon, but without title or livery at all, namely, *per usucaptionem* (*a*); that is, by continual and peaceable possession for a length of time; yet what length of time was necessary to give such a right, was not defined by the law, but was left to the discretion of the justices.<sup>3</sup> Thus all intruders, disseizors, farmers holding over their term, persons continuing in possession contrary to a covenant or the original form of the gift, if they were suffered to remain in that condition without any interruption for a length of time, gained a right and freehold. Though this was the law amongst subjects, in order to avoid dormant and litigious claims, yet in the case of the king it was

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(*a*) This head of law, and the very term used to describe it, *per usucaptionem*, are borrowed from the Roman law; and, it may here be observed, that by far the greater portion of Bracton's treatise, so far as it relates to private civil rights, is taken from that source, and is, as Sir William Jones said, borrowed from Justinian. The phrase used by Bracton is, "*longa pacifica, et continua possessio* (p. 52), *quia sicut tempus est modus inducendæ, et tollendæ obligationis, ita erit modus acquirendæ possessiones longa enim possessio (sicut jus), parit jus possidendi, et tollet actionem vero domino, petenti quandoque omnem quia omnes actiones in mundo infra certa tempora habent limitationem*" (p. 53).

<sup>1</sup> It is worthy of remark, that this piece of old law was reconsidered, and after long discussion confirmed, 500 years after Bracton wrote, in a famous case in the King's Bench. *Vide Burr. Rep.*, 60.

<sup>2</sup> Bract., 41 b.

<sup>3</sup> *Ibid.*, 51 b.

otherwise; the maxim of *nullum tempus occurit regi* having already obtained in his favor.<sup>1</sup>

We have hitherto been speaking of *corporeal things*. It follows, that something should be said of *in-*  
Rights.*corporeal*, and the methods of transferring them.

These were called *jura*, and *servitudes*, or *rights*: and being things neither visible nor tangible, could not pass by livery: they therefore passed by agreement of the parties contracting,<sup>2</sup> and by a view of the corporeal thing to which they belonged; thus, by a fiction of law, they became what was called *quasi*-possessed; and he who was so in possession by fiction of law, had a *quasi*-use till he lost the possession by violence or by non-user; for as possession of a corporeal thing could be lost by non-user, so could a *quasi*-possession of an incorporeal thing. But when there was an actual user of an incorporeal thing, the possession was retained by the user, and became real, instead of fictitious: and when a person had thus made use of his right, he might transfer the right and the use to another, which before user he could not. If a person, however, who had an incorporeal right to him and his heirs, died without any user thereof, the title would descend to his heirs.

These rights were generally considered as, and were called, *appurtenances* to some corporeal thing, as to a farm or tenement; and were commons, rights of advowson, and the like.<sup>3</sup> An advowson and common were sometimes not appurtenant to anything, but subsisted as independent rights.<sup>4</sup> Of a nature similar to these were other incorporeal things, which were given by the king only, as liberties and franchises; such as jurisdiction and judicature, treasure-trove, waifs, tolls, exemption from tolls, and numberless other royalties, which were granted by charter from the king to the subject.<sup>5</sup>

Besides the gifts above mentioned, which being transactions between man and man, were to take effect immediately, there was another sort, which was to take effect after the donor's death: such a gift was called *donatio mortis causâ*. A gift of this kind was generally made by a person in sickness, or going upon a voyage, and had in it a tacit condition, that it should be revocable upon the recovery or return of the giver. Should a gift not be ac-

<sup>1</sup> Bract., 52 and 103.

<sup>2</sup> Ibid., 93 b.

<sup>3</sup> Ibid., 54.

<sup>4</sup> Ibid., 54 b.

<sup>5</sup> Ibid., 55 b.

accompanied with this condition, it was a *donatio inter vivos*; and therefore, if made between husband and wife, was void. A *donatio mortis causâ* was confirmed by the death of the giver.

The principal gift of this kind was by testament; and this did not take place till after the death of the giver.<sup>1</sup> The whole law of testaments stated Testaments. by Glanville, is delivered by Bracton as law, and sometimes in the very words of that author; it will therefore be unnecessary to do more than notice such parts as are more explicitly treated by Bracton, together with such additions as he has made to Glanville's account.<sup>2</sup> He says, that, generally, a wife could not make a will without the consent of her husband; yet that it had been usual (as was intimated by Glanville)<sup>3</sup> for the wife to make a will of the *rationabilis pars* which would come to her if she survived her husband, and particularly of such things as were given her for the dress and ornament of her person, as her clothes and jewels, all which might most properly be called her own.

Glanville says, that the administration of intestates' effects belonged to the nearest of kin; but Bracton says, that in such case, *ad ecclesiam et ad amicos pertinebit executio bonorum*. The law upon the subject of testaments is thus laid down by our author. The expenses of the funeral were to be allowed out of the effects, and the widow was entitled to receive all necessities thereout till her quarantine was expired, unless her dower was assigned before. If the deceased left no movables, the heir was to be burdened with all the debts,<sup>4</sup> as far as the inheritance went, and no further. There were particular customs which directed a disposition of the effects somewhat differing from the general law: this was in some cities, boroughs, and towns. Among these, the city of London had a custom, that when a certain dower was appointed, whether in money or other chattels, or in houses, which were considered as chattels, the widow could demand nothing, beyond that, out of the effects, unless by the special favor of the husband, who might leave her more: and again, the children could not demand, by pretence of any custom, more than was left them by testator, if he made a will.

<sup>1</sup> Bract, 60.<sup>2</sup> Vide vol. i., 365.<sup>3</sup> Vide ante.<sup>4</sup> Ibid., 60 b.

Bracton says, that a man could not make a will of a right of action, nor of debts not judicially ascertained, but that actions for such things belonged to the heir: yet, when these were once reduced into judgments, they became part of the *bona testatoris*, and belonged to the executors, under the direction of the ecclesiastical court<sup>1</sup> (a).

(a) A far more natural and probable explanation is, that the jurisdiction as to probate of testament came to the ecclesiastical courts, simply for this reason, that in the age in which it arose, few persons could read or write except ecclesiastics; and the jurisdiction in cases of intestacy came to be joined with it, for reasons equally obvious, that it was very much mixed up with the former; that it often involved a question of testament (for, of course, if a testament was invalid, the case was one of intestacy), and also because the division of the effects and the appropriation among the next of kin in due order and proportion, were matters rather beyond the laity in an age when they were ignorant and unlettered. This view is supported by the fact that in many manors the jurisdiction was by custom vested in the lords, no doubt in some cases because they were ecclesiastics, but in others, there can be as little doubt, because they were lettered laymen. The notion that the jurisdiction arose from the canon laws, which vested in the bishops the distribution of bequests left for pious uses, took its rise in an age when prejudices against everything ecclesiastical often suggested inferences not supported by any authority; and it will be found upon reflection untenable, because there it does not account for the fact that the jurisdiction was often in lay lords; and it overlooks the fact that the bishops held only canonical jurisdiction over the portion left for pious uses, which could not be available until all debts were satisfied (this being a just principle of canonical, not less than common law), so that the jurisdiction, according to the canons, could not arise until the estate already was in a great degree administered; and further, this view in question does not account for the fact that the jurisdiction was often in laymen. It is surprising that our author should here appear to represent all this as a mere novelty or innovation, since in chapter iii. he had already fully quoted Glanville, who showed that it was the law in his time, viz., that it was well understood that a man could bequeath nothing to anybody until his debts were paid; and that, even after satisfying debts, the "reasonable" part was still due to the wife and children, or next of kin; and that the administration was in the next of kin, except as to what was left to pious uses. He says distinctly that this was so in the case of a man leaving a will, but appointing no executor, which is a case of intestacy; and, he says, the law gave a remedy to the next of kin against any person holding the effects of the deceased. "If he should not nominate any person for the purpose, the nearest of kin and relatives of the deceased may take upon themselves the charge, and this so effectually, that should they find the heir or any person detaining the effects of the deceased, they should have the king's writ, and that justly and without delay the reasonable division should be made" (*Glanville*, lib. vii., c. 6-8). Nor can there be any doubt that it was so in any other case of intestacy: that is, that if the bishop or any ecclesiastic should be so unwise as to meddle with the goods before the debts were satisfied, and also the "reasonable division" in favor of the relatives, they might recover from him the effects, and make the distribution. It is clear, therefore, that the bishops could have no concern except with the portion left to pious uses, and that nothing could be applied to such uses until

<sup>1</sup> Bract., 61.

Whatever doubt there might have been whether the ecclesiastical court entertained suits for the recovery of

the debts and the relatives were satisfied. On the other hand, it is also equally clear that the law had always been, after satisfying the debts and "reasonable share" of relatives, the residue was understood to be for pious uses. For, in the laws of Henry I., it was laid down clearly that the first charge upon the effects of the deceased were his debts: "Si quis debitor moriens testamenta aliqua fecerit, quicunque in hereditatem successerit, omne debitum ejus juste restituat et omne factum idoneare studeat" (*Legis Henrici Primi*, c. 75); while, at the same time, it was laid down that the residue of the goods of an intestate, after a proper distribution and satisfaction of debts, were for the benefit of his soul, "Si ipse preventus pecuniam suam non dederit, uxor sua, liberi aut parentis, aut legitimi homines ejus eam pro anima ejus dividant, sicut eis melius usum fuerit" (*Ibid.*, c. i., Charter of Henry I.). Thus the law in effect was stated by Glanville (*temp.* Hen. II.), for he says that so far as a man was indebted, he could not leave anything; but if he were not involved in debt and died intestate — then after satisfying claims of creditors and relatives — the residue would be received for himself (lib. vii., c. 5), which of course meant, in that age, for his soul, since that was the only way in which goods could be for the benefit of a dead man. But he expressly states that if the deceased was overburdened with debts, he could not, beyond the payment of his debts, make any disposition of his effects; but should it happen that anything remained, then it was distributed and applied as above stated. He says nothing about ecclesiastical jurisdiction in cases of intestacy, obviously because it was only incident to testament, and because ecclesiastics had only to grant administration, save as to the portion in pious uses. According to this law, the distribution would take place under the joint guardianship of next of kin, and of the church, or by the next of kin under the care of the church; and so the charter of John provided that if any freeman shall die intestate, his goods shall be distributed by the next of kin, and by the view of the church (c. 27), which did not therefore alter, but only declared, the law. That was left out in the subsequent charters, but the law remained as it had been before, and perhaps it was omitted as unnecessary. It is manifest that the ecclesiastical courts had no power, except to adjudicate as to whether there was a testament, and, if not, then to grant administration, or appoint persons as next of kin to administer. It is plain they must have been next of kin, or the next of kin could (unless the distribution was duly carried out) recover the effects by law (*vide supra*); and the administrators being next of kin, would, it is certain, look after their own interests, and protect the assets for creditors or for themselves, it being clear law, according to Bracton, that whoever took the assets was liable to the debts, as far as the assets went, "Quatenus ad ipsum pervenerit, scilicet de hereditate defuncti, et non ultra" (61 a, *Fleta*, lib. ii., c. 57, s. 10). It might, however, indeed happen, that goods left to the church by a person solvent, though indebted, and therefore liable to debts, might come into the hands of ecclesiastics, and it might be convenient that they should administer, and satisfy the debts and the relatives; but they were bound to do so, and then administration was jointly with and under the eye of the next of kin. It might be that in some cases they were dilatory (as administrators usually are), but there could be no doubt of their legal liability to the next of kin. It is said in *Fleta* (c. 57, De Testamentis, s. 10), "Item si liber homo intestatus decesserit, et subito dominus suus nihil se intromittet de bonis suis, nisi toutum de hoc quod ad ipsum pertinuerit, scilicet, quod habeat suum Heriotum, sed ad ecclesiam et amicos pertinabit executio. [Sed quid ordinarii hujusmodi dona nomine ecclesiæ occupantes, nullam vel

legacies in the time of King John,<sup>1</sup> it is beyond a question, that in the beginning of Henry III. that branch of jurisdiction was firmly settled.<sup>2</sup> It is probable, that legacies were a subject *mixti fori*, in the same manner as tithes long were, before they became entirely confined to the spiritual court; but it appears that the temporal courts in this king's reign so far gave up their claim, as not to prohibit the ecclesiastical judges. This article of jurisdiction might be thought not a very unlikely consequence to follow from the power of granting *probates*; but it is conjectured by a canonist of great authority,<sup>3</sup> that it took its rise out of those laws in the code which made the bishop protector over legacies given *in pios usus*. It is consistent enough with the usual practice of churchmen in particular, and conformable with the inclination of courts (*ampliare jurisdictionem*), to suppose that the ecclesiastical court might have gradually gained jurisdiction over all personal legacies under color of such as were given *in pios usus*.<sup>4</sup> This might have been

saltem indebitam faciunt distributionem, ideo provisum fuit quod hujusmodi ordinarii de debitis defuncti satisfacerent, quatenus bona et facultates sufficerent, nullam enim pœnam meretur, quamvis intestatus decedat; postea verà deduci debent debita aliorum quæ clara sunt et recognita, inter quæ connumerari poterunt servitia servientum et stipendia famulorum; dum tamen certa sint, si autem incerta sint, etc." (*Selden's Fleta*). This passage is to be found word for word in Bracton (p. 16), except the words enclosed in brackets, which are introduced into *Selden's Fleta*. It is to be noted that Bracton, while mentioning customs to leave something to the lord and the church, distinctly states that the heir is bound to pay the debts, and that no one is bound to give anything to the church: "Et quamvis non teneretur quis aliquid dare ecclesiæ suæ, nomine sepulturæ tamen cum consuetudo illa laudabilis existat, dominus Papa non vult eam infringere, post quam vero quam ecclesiam suam etiam recognoverit, deinde parentis et alias personas" etc. (*Bracton*, 61). Again he states that the representatives are bound to pay the debts, and then comes the above passage. But that ecclesiastics ever could, according to the canon law or any other law, appropriate the assets of the deceased without first satisfying debts and legal liabilities, including just claims of relatives, is absurd. Neither had the law ever been altered in any way up to this time, nor was it altered after this time, however it may have been on some points aided and enforced, as, for instance, by giving creditors legal remedies against the next of kin administrators. At common law the administrators or next of kin had ample legal remedy against the ecclesiastics, or any one withholding the assets; but the law gave no remedy against the administrators or next of kin, so that, as regarded them, it was only a matter of conscience to be enforced in the ecclesiastical courts. Hence the necessity for alteration of the law in that respect, as against administrators.

<sup>1</sup> *Vide* vol. i.<sup>2</sup> Hen. III., Tit. Pro., 13.<sup>3</sup> Lindewoode.<sup>4</sup> 3 Seld., 1675.



the first step towards it; but it is most probable, that there was a direct authority for this innovation derived from the canon law. For although the *Decretals*, where it is set forth as a general law, were not published by Gregory IX. till the 24th year of Henry III., the canon which warrants this point of judicature was much more ancient, and without doubt, had travelled hither long before the collection of Gregory was made; and the authoritative promulgation by that pope, might give new sanction to a usage which had obtained some time before.

The granting administration of intestates' effects by the ordinary, though established on a more solid foundation, the express law of this country, by the charter of King John and confirmed by that of Henry III.,<sup>1</sup> did not prevail universally. It seems that lords in some places, in maintenance of their former right, still exercised some jurisdiction in the disposition of intestates' goods, in opposition to the authority of the bishops. The power hereby intrusted to the bishops was abused in a very shameful manner; for instead of taking order for a due distribution of such goods, when they had once got possession of them, they committed the administration of them to their own use, or the use of their churches, and so defrauded those to whom, by right of succession, they belonged; and this they did with the pretence of law and conscience on their side, affecting that this disposition of them *in pios usus* very fully satisfied the requisition of law (a). This practice grew to such a height, as to occasion a constitution in this king's reign, enjoining that

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(a) It will be observed that for all this there is no authority, unless it be that it is borrowed from Selden, who is not a contemporary authority, and whose writings are so prejudiced against all things ecclesiastical that he cannot be relied upon, save so far as he cites contemporary authority, of which in this matter he cites none that supports this absurd representation. It is utterly at variance with what the author had already quoted from Glanville, viz., that the law gave the heirs or next of kin a very good and sufficient remedy against any one withholding the effects of the deceased, and also laid down very clearly, quite in accordance with canon law, that the debts must first be satisfied. It is a fundamental principle of canon law, as the author, if he had been in the least acquainted with it, would have known. He, indeed, refers to Lyndwood as his authority on canon law (*vide ante*), but merely gives his own account of it, instead of resorting to the canon law itself; and in the next passage, when he cites the *Decretals*, he entirely misrepresents their effect.

<sup>1</sup> This clause, as before observed, was left out of the *Inspecimus*, 25 Edw. I., and so is not in the common printed charters.

they should not dispose of them otherwise than according to the Great Charter, that is, to the next of kin (a); notwithstanding which, the practice still continued, and the right of succession was, by degrees, in a manner altered. It was even stated by the canons, as the law of the land,<sup>1</sup> that a third part of intestates' effects should be distributed for the benefit of the church and the poor<sup>2</sup> (b); which was in effect the whole that properly belonged to the intestate, after the *partes rationabiles* of the wife and children. These abuses of ecclesiastical judges gave occasion to two statutes, made in the reign of Edward I. and Edward III.

The last mode of acquiring property was by *succession*.

Of descent. The law of descent in the time of Glanville

continued, with some small variation. We have seen that in Glanville's time the eldest son was the sole heir, in knight-service, and in most instances in socage;<sup>3</sup> but it was now laid down by Bracton, generally, that, in both cases, *jus descendit ad primogenitum*.<sup>4</sup> It was

(a) It appears from the next reference that the author quoted from Selden; but if he had quoted the terms of the Decretal, it would have appeared that this meant *after the satisfaction of just debts*. It was only after *that* the distribution could commence, as the author must have known from Glanville, whom he had himself cited upon that point (c. 3). He must have forgotten this, to fancy that the canon law could ever have laid down anything so monstrous as that the next of kin and the church could divide all the effects *before* satisfying the debts of the deceased. The canonists were too good lawyers for that, and what they laid down was in exact accordance with the law of the land, viz., that upon the distribution, which could only commence *after* satisfaction of debts, the third part belonged to the deceased, that is, was to be applied to pious uses for the benefit of his soul. This was according to the ideas of the age, and the law was naturally in accordance with them. It may be added that it is the third book of the Decretals which treats of testaments and intestacy, and in which the ecclesiastical law is stated to the effect that the debts must first be satisfied.

(b) The author does not quote this constitution, nor give any reference to it, nor state whether it was an ecclesiastical or a lay constitution, nor when it was enacted, nor what are its terms; and so far as he states it, there is nothing to show that it was aimed at the *church*, nor is there any reason to suppose that it was, seeing that, as already shown from Glanville, the next of kin had already ample remedy against *any one* withholding the effects, unless, indeed, it was the *crown*; and all the charters *after* the time of John contained a clause to protect the assets of deceased tenants of the *crown* from the exactions of the king's officers, who seized the effects on the plea of indebtedness to the crown, and this clause therefore provided that, after satisfying the debts to the crown, the residue, or, if there were no debts to the crown, then the *whole* should be distributed among the next of kin, that is, of course, according to the law, leaving a share for the deceased.

<sup>1</sup> Decretal, lib. v., tit. 3, c. 42.    <sup>2</sup> 3 Seld., 1681.    <sup>3</sup> *Vide* vol. i., 362.

<sup>4</sup> Bract., 64 b.

also now held, that all descendants *in infinitum* from any person who would have been heir, if living, were to inherit *jure representationis*. Thus the eldest son dying in the lifetime of his father, and leaving issue, *that* issue was to be preferred, in inheriting to the grandfather, before any younger brother of the father; which settled the doubt that had occasioned so much debate in the time of Henry II.<sup>1</sup>

The rule of descent was, that the nearest heir should succeed: *propinquior excludit propinquum, propinquus remotum, remotus remotiorem*. Sometimes the right of blood constituted a particular sort of propinquity, to the prejudice of the male heir, who, in other instances, is so much favored in our law; as in the following case: A man had a son and daughter by one wife, and after her death married another, and had a son and daughter by her; the son of the second marriage made a *purchase* of land, and died without children: in this case, says Bracton, the sister by the second wife would take, in exclusion of the other brother and sister. Some were of opinion, that this piece of law was entirely confined to cases of purchased lands, but that it was otherwise in cases of inheritance; for there respect was always to be had to the common ancestor from whom the inheritance descended; and the right should never come to a woman so long as there was a male, or one descended from a male, whether from the same father and mother, or not.<sup>2</sup> Bracton, however, seems to think, that this rule of descent was to be observed in *inheritances*, as well as in purchased lands; because every one, as he came into seisin, made a *stipes* and a first degree;<sup>3</sup> and so it was settled in the next reign, when this opinion of Bracton was adopted in the maxim, *seisina facit stipitem*. The impediment thrown in the way of descent by the rule, *nemo potest esse hæres et dominus*, still continued, though it was avoided by many devices; the most common of which was that of infeoffing to hold of the chief lord, and not of the feoffor; for this avoided the necessity of doing homage to the elder brother.<sup>4</sup>

The law had provided a preventive against imposing supposititious children, to exclude those who were next entitled to the inheritance. If a

*De partu supposito.*

<sup>1</sup> *Vide* vol. i., 364.

<sup>2</sup> Bract., 65.

<sup>3</sup> *Ibid.*, 65 b.

<sup>4</sup> *Ibid.*, 63 a, b.

woman, either in the life of her husband, or after his death, had pretended to be pregnant when it was thought she was not, in order to disinherit the heir; the heir might have a writ commanding the sheriff to cause the woman to come before him, and before the guardians of the pleas of the crown, or before such person as the king should authorize to judge therein, and cause her to be inspected by lawful and discreet women, in order to inquire of the truth;<sup>1</sup> and she was put in a sort of free custody during her pregnancy, that the imposture, if any, might not escape detection. This was the way in which a woman was dealt with, when she falsely pretended to be pregnant. If the husband and wife agreed together in educating a supposititious child as their own, the right heir might have a writ *quodd habeas corpora* of the husband and wife before the justices, where the truth would be examined. Another person who had a temptation to play this trick upon the next heir, was the chief lord, who, when he had an heir in ward, and it died, would sometimes set up another, in order to continue the custody of the land; in which case, there was a writ and proceeding similar to the former.<sup>2</sup>

When an inheritance descended to more than one heir, and they could come to no agreement among  
Of partition.
themselves concerning the division of it, a proceeding might be instituted to compel a *partition*. A writ was for this purpose directed to four or five persons, who were appointed justices for the occasion, and were to *extend* and appreciate the land by the oaths of good and lawful persons chosen by the parties, who were called *extensores*; and this extent was to be returned under their seals, before the king or his justices; when partition was made in the king's court, in pursuance of such extent, there issued a *seisinam habere facias*, for each of the *parteners* to have possession.<sup>3</sup>

It remains only to say a few words on the claim of  
Dower.
dower, and then we shall have finished this part of our subject, namely, the title of private rights. Dower is defined by Bracton not in the words, but upon the ideas of Glanville.<sup>4</sup> Dower, says he, must be *the third part of all the lands and tenements which a man had*

<sup>1</sup> Bract., 69, 70 a, b.

<sup>2</sup> Ibid., 70 b, 71.

<sup>3</sup> Ibid., 71 b, to 77 b.

<sup>4</sup> *Vide* vol. i., 354.

*in his demesne, and in fee, of which he could endow his wife on the day of the espousals;*<sup>1</sup> so that, according to Bracton, the claim of dower was still limited to the freehold of which the husband was seized at the time of the espousals, notwithstanding the provision of *Magna Charta*, which seemed to extend it to all the land that belonged to the husband during the coverture.<sup>2</sup> The regular assignment of dower had been secured to widows by the chapter of *Magna Charta* just alluded to, and it was rendered more effectual by a provision in the statute of Merton.<sup>3</sup> More will be said of dower when we come to the remedies which the law had furnished for recovery of it.

Thus far concerning the law of private rights, as it stood in the time of Henry III.

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<sup>1</sup> Bract., 92.

<sup>2</sup> *Vide* vol. i., 356.

<sup>3</sup> *Ibid.*, 261.

## CHAPTER VI.

### HENRY III.

OF ACTIONS — OF COURTS — WRITS — OF DISSEISIN — ASSIZE OF NOVEL DISSEISIN — FORM OF THE WRIT — PROCEEDING THEREON — OF THE VERDICT — EXCEPTIONS TO THE ASSIZE — ASSISA VERITUR IN JURATAM — QUARE EJECIT INFRA TERMINUM — ASSIZE OF COMMON — OF NUISANCE — ASSISA ULTIMÆ PRÆSENTATIONIS — EXCEPTIONS THERETO — OF QUARE IMPEDIT — QUARE NON PERMITAT — ASSISA MORTIS ANTECESSORIS — VOUCHING OF WARRANTOR — WHERE THIS WRIT WOULD LIE — WRIT DE CONSANGUINITATE — QUOD PERMITTAT — ASSISA UTRUM — OF CONVICTIONS — AND CERTIFICATES — OF DIFFERENT TRIALS — DOWER UNDE NIHIL — WRIT OF RIGHT OF DOWER — OF WASTE — OF WRITS OF ENTRY — DIFFERENT KINDS THEREOF.

THE whole course of judicial proceeding, since the time of Glanville, had become a business of much learning and refinement; the writ, the process, the pleading, the trial, every part of an action was treated as a subject of intricate discussion. While these changes were made in the old remedies, new ones were invented, as more peculiarly adapted to certain cases than those before in use. Of all these we shall treat in their order.

Actions are divided by Bracton into such as were *in rem*, or *in personam*, or *mixt*; that is, *real*, *personal*, or *mixed*.<sup>1</sup> Personal actions were for redress in matters *ex contractu*, and *ex maleficio*, as the civilians termed it; and also in such as they called *quasi ex contractu*, and *quasi ex maleficio*. It follows, that of personal actions arising *ex maleficio*, some were *civil*, and some *criminal*. Real actions are for the recovery of some certain thing; as a farm, or land: they were always brought against the person then in possession of the thing, and were for the recovery of it *in specie*, and not for an equivalent in damages.<sup>2</sup> When an action was brought for any movable, some thought that it should be considered as a real action, as well as personal, because the person possessed of it was to make restitution of the thing in ques-

Of actions.

<sup>1</sup> Bract., 101 b.

<sup>2</sup> Ibid., 102.

tion; but says Bracton, this was, in truth, only personal: for the defendant was not obliged specifically to restore the thing demanded, but was only bound to the alternative of restoring the thing, or its price; and therefore, in such an action, the price of the thing ought always to be defined. A mixed action was so called, because it was *tam in personam, quàm in rem*, having a mixed cause on which it was founded; as the proceeding *de partitione* among parceners, and *de proparte sororum*; that for settling of bounds between neighbors and baronies *per rationabiles divisas*, or *per perambulationes*; in which each party seems to have been plaintiff and defendant, though he alone was properly plaintiff who commenced the suit.

Real actions were divided into such as were to recover *possession*, and such as were to recover the *property* (a); a distinction which will be very strictly observed in all we have to say on these actions, and was rigidly adhered to in applying them; it being a rule, that though a person who had failed in any proceeding for the possession, might resort to the next superior remedy, yet he could never descend. He might have an assize of novel disseisin; and if he failed in that, he might have a writ of entry (a new writ, of which we shall soon say more), and lastly a writ of right: but having begun with a writ of right, he could not avail himself of the other remedies.<sup>1</sup>

Some actions were permitted by law to be brought at any distance of time; but, in general, actions were *limited* to be brought within a certain period, on account of the defect of proof which would happen in a course of years.<sup>2</sup> Suits which were to recover such things as belonged to the king's crown, might be brought at any distance of time; on which privilege of the king was founded this rule, that *nullum tempus currit contra regem*, or *nullum tempus occurrit regi*; and it should seem from Bracton's man-

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(a) The distinction drawn in the *Mirror* between these two kind of jurisdiction is in the object, *i. e.*, whether it be punishment or compensation (c. iii., s. 17). If punishment corporally, as by compulsion, by imprisonment (as opposed to its substitution for fine), or by bodily infliction, then the matter was regarded as criminal; but otherwise, if it was in its nature the subject of reasonable satisfaction (c. ii., s. 24). And again, if any one seek revenge, he ought to bring his action by appeal for felony; if he seeketh only reparation in damages, then it behoveth him to bring his action by writ (c. ii., s. 3).

<sup>1</sup> Bract., 104.

<sup>2</sup> Ibid., 102 b.

ner of expressing himself, that, inasmuch as the suits of private parties were limited, because, beyond a certain period, they could hardly be able to bring proofs; the king, in concurrence with the privilege of instituting his suits without any limitation of time, should, in questions of antiquity, be entitled to throw the *onus probandi* on the defendant (a); and on his failing, should recover without bringing any proof at all.<sup>1</sup>

Before we enter upon the proceeding and conduct of actions then in use, it may be convenient to premise a short view of the courts in which civil and criminal justice was administered: and first of criminal suits (b). Criminal suits, where a corporal pain was to be inflicted, used to be determined *in curiâ domini regis*, in the king's court; which general expression is explained in Bracton by saying, that if the offence concerned the king's person, as the crime of lese majesty, it was determined *coram ipso rege*, by which was meant the great superior

(a) In the *Mirror*, however, which often follows Bracton very closely, the same doctrine is laid down, "As to the alienations and occupations of franchises, appendants to the crown, a man shall not prescribe for them, for of such dignities none can help himself by a plea of long prescription; but such avowries of long continuance are accounted rather prescriptions of wrong, seeing that *nullum tempus occurrit regi*; but therein the king is like an infant, who can lose nothing, although for the personal wrong the party may excuse it by showing that he enjoyed the privilege by succession or assignment; but this is counter-pleadable by alleging that the ancestor could not grant it," etc. (c. iii., s. 26). It is to be observed that there is mention in the *Mirror* of limitation of criminal suits since the last "eyre," a circuit of assize of "oyer and terminer," which used at one time to be once in seven years, though the period varied. There was also the limitation of an assize of novel disseisin. In the *Mirror* it is said to be an abuse to allow an action after the last eyre.

(b) The corporal punishments in those times were cruel, and in some cases horrible, though there was a gradual process of amelioration already beginning. The law of William the Conqueror allowing mutilation has been already alluded to. But even in the *Mirror* it is mentioned that cut-purses used to be punished by the cutting off of their hands (c. ii., s. 13); and although it seems Richard I. rather mitigated this, it was only mitigated to cutting off the ear (*Ibid.*, s. 21). Perjury was punished by *cutting out the tongue* (*Ibid.*, s. 13). Some offenders were flogged or beaten. As to capital sentence, some offenders were hanged, others boiled or burnt; others, as in treason, hanged and cut down alive, and then disembowelled and cut to pieces. And it seemed scarcely credible that some of these horrors continued almost to our own time, and that even in our own time men were hanged for forging five-pound notes or stealing sheep. So ingrained in barbarism was our criminal code, owing to the savage spirit of the Saxon, the Norman, and the Dane.

<sup>1</sup> Bract., 103.



court, of which so much has been already said: if it concerned a private person, it was *coram justitiariis ad hoc specialiter assignatis*; that is, we may suppose, either the justices in eyre or of jail-delivery (a). These were all equally the king's courts; and as the lives and limbs of his subjects were in the king's hands, either for protection or punishment, it was proper they should be subject to his decision only, unless in the few instances where persons enjoyed the franchise of holding a criminal court; as the franchises of *Toll and Tem*, of *Infangthef* and *Outfangthef*.<sup>1</sup>

The courts for the determination of civil suits were as follows:—Real actions might be commenced in the lord's court of whom the demandant claimed to hold his land, from whence they might be transferred, upon failure of justice, to the sheriff's court, and from thence to the superior one;<sup>2</sup> but if such a suit was not removed for some cause or other, it might be determined in the court baron. In the county court were held pleas upon writs of *justicies*, as *de servitiis et consuetudinibus*, of debt, and an infinitude of other causes, among which were, suits *de vetito namio*, and pleas *de nativis*, unless it became an issue, whether free or not, and then the inquiry stood over till the coming of the king's justices; the question of a man's liberty being thought of too high consideration to be intrusted to an inferior jurisdiction.

Such civil actions, whether personal or real, which were determinable in the king's court, were heard before justices of different kinds. The different courts which were called the king's are thus described by Bracton:

(a) This does not appear altogether a correct rendering of the text of Bracton, which our author is merely following. What Bracton seems to mean is that actions are *necessarily*, in *fact*, and in a certain sense, limited, because in course of time the proofs fail, "*Sunt quedam quæ aliquando fiant perpetuæ, et durare solent sine tempore præfinitione, hodie vero fere omnes supra certa tempora limitantur, pro defectu probationum, et sic sunt temporales, secundum quarundam actionem diversitates.*" And then he points out that this cannot apply to the pleas as to liberties and franchises of the crown, nor affect the maxim *nullum tempus occurrit regi*, because as to these the onus of proof is on the defendant, "*Cum probare non habeat necesse, et sine probatione obtinebit, si implacitatus warrentum non habuerit, nec specialem libertatem, quia se ex longo tempore, non defendet*" (*Bracton*, lib. iii., f. 103). Bracton, however, as to the rights of the crown, can hardly be relied upon; and when in the reign of Edward I. it was attempted to apply this doctrine, and to oust men of their franchises, by *quo warranto*, on the principle thus stated, such an outcry arose that the king had to desist.

<sup>1</sup> Bract., 104 b.

<sup>2</sup> *Ad magnam curiam.* Bract., 105.

*Curiarum habet unam propriam, sicut aulam regiam, et justitios capitales, qui proprias causas regis terminant, et aliorum omnium, per querelam, vel per privilegium sive libertatem;* the latter part of which description he explains by instancing one who had a grant not to be impleaded anywhere but *coram ipso domino rege*; though it might be doubted whether *per querelam* is thereby explained, and whether that expression does not mean a distinct method of proceeding by *complaint*, similar to what we see at this day in the modern King's Bench, and of which we shall have occasion to say more hereafter. Thus far of the *aula regis*. Our author proceeds, and says, *habet etiam curiam, et justitios in banco residentes, qui cognoscunt de omnibus placitis, de quibus auctoritatem habent cognoscendi; et sine warranto jurisdictionem non habent, nec coercionem*; in which he seems to describe the bench as having no authority but by the writs returnable there. He goes on to mention the justices itinerant through the counties; sometimes *ad omnia placita*; sometimes *ad quedam specialia*; as to take assizes of novel disseisin, of mortaucestor, and *ad gaolas deliberandas*, to deliver one or more particular jails (a). As causes were sometimes removed from the court baron to the county, so, as appears from Bracton, and as was hinted above, were they removed before the justices itinerant, and from thence into the bench, or *coram rege*.<sup>1</sup> These are all the courts spoken of by Bracton; and therefore it must be concluded that the Court of Exchequer was still considered as identically the same with the *aula regis*; and that the *propriis causas regis* particularly meant

(a) In the *Mirror* it is said, "The king appoints justices in divers manners, sometimes certain, as in commission of less assizes; sometimes in commissions generally, as of commissions of justices in eyre, and of the chief justice of pleas before the king, and of justices of the bench, to whom jurisdiction is given to hear and determine fines, the grand assizes, the transaction of pleas and the rights of the king" (c. iii., s. 3). These courts are the King's Bench and the Common Pleas. "Besides these, the barons of the exchequer have jurisdiction over receivers and the king's bailiffs, and alienations of lands and rights belonging to the crown. Sometimes the jurisdiction is given to the justices of the bench by removing the pleas out of the counties before them, and sometimes to record pleas holden in mean courts without writs before the justices. To the office of the chief justices, *i. e.*, the judges of the chief court, the King's Bench, it belongeth to redress the tortious judgments, and the errors or wrongs of other justices, and by writs to cause to come before them the proceedings and records. Also to hear and determine all complaints of personal wrongs within twelve miles of the king's household."

<sup>1</sup> Bract., 105 b.

the government of the revenue, which is perfectly consistent with the account before given<sup>1</sup> of this great court in its first origin, and before the bench had any existence.

Besides this express account of courts, there are scattered up and down Bracton's works several passages which give us intimation of the nature of these courts, the principal of which are the returns of writs. A comparison of such expressions, as they occur in the course of this chapter, will throw a new light on the judicature of the time.

The subject of writs seems to have been studied with great diligence; writs had been devised for a greater variety of occasions than in Glanville's Writs. time, and they were discussed with more precision and system. Bracton divides writs into different kinds, in this way. He says there were some which were *formata super certis casibus*, *DE CURSU*, *et de communi consilio totius regni concessa et approbata*; and these could not be changed without the consent of the same power that framed them. There were others which he calls *magistralia*, and which were varied according to the variety of cases and complaints. These *magistralia brevia*, it should seem from Bracton's account of them, were distinguished from, and put in contrast with, the *brevia formata*, as being changeable without the permission of the legislature.<sup>2</sup> Those which gave origin and commencement to a suit<sup>3</sup> were called *brevia originalia*, and were called, some of them *aperta*, or *patentia*, and some *clausa*; such as arose out of these were called *judicialia*; these were varied according to the pleadings between the parties, and the particular purpose which they were to answer.

In discoursing on the nature of civil actions, we shall begin with those that were called *real*. In order to understand the design of the various real remedies which the law furnished, it will be necessary to attend to the manner in which they considered the occupation of land and its appurtenances, under the circumstances of a more or less complete enjoyment.

Of land, a man might have either what they called *possession*, or what they called *jus*, or *proprietas*. Possession was of various sorts, and divided by very nice

<sup>1</sup> Vide vol. i., 269, 270, etc.

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<sup>2</sup> Bract., 413 b.

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<sup>3</sup> Ibid., 414 b.

distinctions. One was said to be *quædam nuda pedum positio*, which they called *intrusion*: and this contained in it, says Bracton, *minimum possessionis*, and *nihil juris*, being somewhat of the nature of a disseisin: in both it was a *nuda possessio* till it received a *vestimentum* by length of time. Another was a precarious and clandestine possession, attended with violence, which acquired no *vestimentum* by length of time; and this, says the same authority, had *parum possessionis* and *nihil juris*. A possession for term of years, as it gave nothing but the usufruct, was considered in a degree higher, as having *aliquid possessionis*, but *nihil juris* (a). The next was for life, as dower, or the like; and this being a step higher, was said to be *multum possessionis*, but still *nihil juris*. The next degree was, where a person had the freehold and fee to him and his heirs; and then he was said to have *plus possessionis, et multum juris*; and he who had the freehold, fee, and property, united in himself, had *plurimum possessionis* and *plurimum juris*, which was called *droit droit*, and contained the highest degree of property

(a) This, it is conceived, by itself might lead to mistake, as it hardly conveys the meaning of Bracton, as the context will clearly show. The words of Bracton are, "Est et alia, que aliquid possessiones habet, et nihil juris, sicut illa que conceditur ad terminum annorum, ubi nihil exigi poterit nisi ususfructus." This, of course, is all that a lessee can take, the fruits and profits; and it is all that an owner in fee can take, the difference being in the *jus proprietatis*, the absolute right of property; and this even a tenant for life had not, for the next sentence is, "Est etiam quædam quæ multum habet possessiones et *nihil juris*; sicut illa quam quis habet ad vitam tantum." So that tenant for years only could be said to have nothing of right, in the same sense in which it might be said of a freeholder, unless he had estate of inheritance. Yet the latter could have assize to recover his land; and so the *Mirror* says of a tenant for years. And it is conceived that the contrary notion, if it ever prevailed in those days, and was not a supposition of later times, was an entire error. In the *Mirror*, under the title of "Novel Disseisin," it is said, "The right of *property* is not determinable by this assize, as is the known possession, or of that which *altogether savoreth of a possessory right*;" and it is added, "Ejection of a term of years falleth into this assize, which sometimes cometh by lease" (c. ii., s. 25). And elsewhere it is said, "It is abuse to think that one cannot recover a term for years" (c. v., s. 1). There were long terms in those times. Thus it is said, "It is abuse that leases of farms are not longer *than forty years*" (*Ibid.*); and it is too absurd to imagine that interests of this duration and nature were without protection. The whole of our legal tradition as to the remedies for recovery of terms of years and the interests of lessees is false and erroneous, and has arisen from theorizing, in place of an attentive study of the *contemporary* records of legal history. At some period, the action of ejectment was instituted, and assizes were confined to freeholds; and then a further error was fallen into of supposing that the term was not recoverable.

and possession; except that, even then, some other person might have *jus majus*, or greater right.<sup>1</sup>

We shall speak of the remedies applicable to these several kinds of possession in the order suggested by the above distinctions, beginning with the writ of *intrusion*. Intrusion was, when a person, not having the least spark of right, came into a vacant possession; as, after the death of an ancestor, before the heir or the lord entered. The person entitled to the reversion, in such case, might have a writ, which had been invented since the time of Glanville, and resulted from some of the artificial notions which we have just stated concerning possession. The form of this writ varied according to the circumstances under which the person bringing it claimed; whether he was the lord or the heir; whether he claimed upon the death of an ancestor, of a tenant in dower, or *per legem Angliæ*, or for life. The following was a more general form of it: *Rex vicecomiti salutem. Pone per vadium et salvos plegios A. quodd sit coram, etc., ad respondendum, or, ostensurus quare intrusit se in terram, etc., quam B. qui nuper obiit, tenuit de eodem C. ad vitam suam tantum, et quæ, post mortem ejusdem B. ad eundem C. reverti debuit, ut idem C. dicit: et habeas, etc.*

Possession created a sort of right; it was advisable, therefore, for the heir to eject the intruder within a year, or at the end of that time, have recourse to this writ; for it is laid down by Bracton, that no one could be put to answer for an intrusion of longer standing. Respecting this time of limitation, Bracton seems not very precise, for he afterwards says, at farthest, not at the distance of ten or twelve years, as was determined in this reign;<sup>2</sup> but the claimant was then driven to his writ of entry, grounded upon the intrusion;<sup>3</sup> a writ lately invented, of which more will be said in its proper place.

The next thing to be considered is, that wrongful possession which was obtained by disseisin, and the method of redress the law directed to be pursued (a). Disseisin was now considered in a very large

Of disseisin.

(a) The author is here still following Bracton, and it is remarkable how entirely the *Mirror* followed him upon this, as upon so many other subjects. "Disseisin is a personal trespass, or a wrongful putting one out of possession; wrong is here taken for deforcement or disturbance, as for ejection. Deforcement, as if another entereth into another's tenement when the rightful owner is at the market or elsewhere, and at his return cannot enter therein, but is

<sup>1</sup> Bract., 159 b., 160.

<sup>2</sup> 16 Hen. III.

<sup>3</sup> Bract., 160, 161 a.

sense, and much beyond the idea to which it was first applied. It was not only when the owner, or his agent, or family, who were in seisin in his name, were ejected from the freehold unjustly and violently, without judgment of law; but also, when a house had been left without any one therein, and the owner, his agent, or family, returning from his business, was denied admittance by one who had taken possession, it was a disseisin; if a man was obstructed in a free use of his freehold, that was a disseisin; for though he might remain in possession, the full extent of that possession was not enjoyed. If any one dug, or put sheep, or otherwise intruded, upon land, under claim of an easement (for if it was without a claim of right, it was only a trespass); or, if a person made improper use of an easement he had a right to: this was a disseisin (*a*). Again, if a person was in seisin for life, or for years, or as guardian, or otherwise, and infeoffed another, in prejudice of the right owner; if a person distrained for services not due, or where they were due, exceeded the bounds of a reasonable distress, these were disseisins. In short, if one claimed to partake with the right owner, or raised an unjust contention against him, it was a disseisin of the freehold.<sup>1</sup>

The above were disseisins without violence; others were said to be violent; but in order to understand what the law considered as a violent disseisin, we must see what

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kept out, and hindered so to do. 1. Disturbance is if one disturb me wrongfully to use my seisin, which I have peaceably had; and the same may be done in various ways, as when one driveth away a distress, so that I cannot distrain in the tenement liable to my distress, whereof I have had seisin before. 2. Another is where one doth replevy his distress wrongfully. 3. As if one distrain me so outrageously that I cannot manure, plough, or sow my land duly" (*Mirror*, c. iii., s. 2).

(*a*) A distinction which, as has been pointed out, was derived from the civil and canon laws (*vide* vol. i., cxvi.), and is to be found in the *Mirror of Justice*. "Note that all property is in two kinds — either in right of possession or in right of property, and therefore there were distinct remedies for either, and the remedy by assize of novel disseisin was for the *known possession* — that is to say, if a man were forcibly turned out of possession, even although he had no *right* to it, he could have restitution by this assize, and the disseizee was put to his writ of right, which was the remedy for recovery of the right of property." "If I take from you forcibly anything of which you have *peaceable* possession, I do wrong to the king; when I use force when I ought to use *judgment*, *i. e.*, resort to a court of law for redress" (c. ii., s. 25). It is very remarkable that it is distinctly stated in the *Mirror* that the remedy lay for a term or lease for years.

<sup>1</sup> Bract., 161 b, 162.

the nature of *vis* was. *Vis* was of two kinds, according to Bracton: thus, there was *vis simplex* and *vis armata*. It is not difficult to conceive what was said to be *vis armata*: it was not only the coming with weapons of any sort, or finding them at the place where they were used; but if a person came with arms, and made no use of them, the terror of them might be thought so to have operated as to make the disseisin seem to have been *cum armis*. *Vis simplex* is defined by Bracton to be *quotiens quis, quod sibi videri putat, non per judicem reposcit*; that is, whenever a person took the law into his own hands. This distinction of *vis cum armis* and *vis sine armis*, was important, as the penalty upon disseizors was proportioned thereto.<sup>1</sup>

Whatever was the way in which the disseisin was committed, the law not only allowed, but required the disseizee, *incontinenter, flagrante disseisinâ et maleficio*, to expel the wrong-doer. What was meant by *incontinenter*, Bracton thinks was pointed out by the term of fifteen days allowed to a tenant summoned in a writ of right. If the owner was present at the time of the disseisin, he was to eject the disseizor that very day, if possible, or on the morrow, or the third or fourth day; and beyond that time, provided he had uninterruptedly continued his endeavors, by calling in the assistance of his friends, and resuming the attack.

If he was absent when the disseisin was committed, then a distinction was to be made according to the distance; a reasonable time was allowed for his getting information of the fact, and for his arrival; and if he pursued his attack upon the disseizor within the stated time after such arrival, the law considered it as done *incontinenter*. As, for instance, if he was out of the kingdom in what was called *simplex peregrinatio* to St. Jago, or in the king's service in Gascony, he had forty days, and two floods and one ebb, which latter indulgence was for the delay occasioned by the sea; and then he had the fifteen days after he returned, and also the four days above mentioned, to resume the attack. If he was in a *simplex peregrinatio* to the Holy Land, he had a year allowed him, together with the fifteen and four days; but if he was in

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<sup>1</sup> Bract., 162.

what they called a *general passage* to the Holy Land, the time was three years, together with the fifteen and four days.

Such was the time allowed by the law for a man to redress the injury he had suffered, but if he permitted a longer period than that to elapse, he gave up his right, and lost both his natural and civil possession, as they called it, which were thenceforward in the disseizée, who could not afterwards be ejected but by judgment of law.<sup>1</sup>

As to the power of redress by the act of the party injured, and the situation in which recourse must be had to the assize, the law may be shortly stated in this manner. For instance, I eject you from your freehold, you may have an assize. Again, I eject you, and you me, incontinently, *flagrante disseisinâ*; I cannot have an assize, because I only suffer what I had before done myself. Again, I eject you, and you eject me, incontinently, and I, again, incontinently eject you; still you may have an assize, and so *in infinitum*; for the true possessor may, by law, eject, incontinently, the wrong-doer, and an assize shall not be brought against him for it; but should the true possessor be negligent, after the disseisin, in pursuing the injury, he lost, as was before said, both his civil and natural possession, and had no redress but by the assize<sup>2</sup> (a).

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(a) Here, again, it is observable how closely the *Mirror* follows Bracton: "It is said wrongful to put a difference from rightful, which is no offence — as, if you take from me that which is mine, I may take it from you again; and I do not offend, for I am warranted to do so by the law of nature. But I cannot do so afterwards; for if I take from you *forcibly* anything whereof you have had the peaceable possession, I do disseize you, and I do wrong to the king when I disseize him of his right, or use force when I ought to use judgment, *i. e.*, resort to law (c. xxiii., s. 27). It is remarkable that, so lately as the reign of Henry VI., lands and houses were forcibly taken possession of and held by force of arms, insomuch that men were actually killed in the defence, as will be seen from the *Paston Letters* (v. 2, l. 281). In that reign, the statute of forcible entry passed, to prohibit such *forcible seizure* of property, and Lord Coke says that it only affirmed the common law. Elsewhere it is said, on disseisin: The jury are not to be examined upon the *title* of the possession, but it is sufficient for the judge to know if the plaintiff were disseized of his land, whether it were rightful or wrongful, according to the plaintiff. For, though it were right, nevertheless it was tortious, because the tenant used force where he should have used judgment, and made himself a judge therein; and judgment is to be given for the plaintiff, so as he shall recover seisin in another court." It is also said: It behoveth to inquire if the disseizers came with

<sup>1</sup> Bract., 163.

<sup>2</sup> Ibid., 164.



If the disseizor transferred the land on the day of the disseisin, or the day after, the donee might be ejected, incontinently, by the true owner, the same as the principal disseizor; in like manner also, the assize might be brought against both; against the first *ad pœnam*, and against the second *ad pœnam* and *ad restitutionem*. If a long interval had passed between the disseisin and the transfer, the second would not have been liable *ad pœnam*, but only to make restitution.<sup>1</sup> Again, if the first wrongdoer was disseized by another, the true owner might either incontinently eject the last disseizor, or bring an assize against him; and if he deferred doing it, the first disseizor might do either. In all these cases of recovering possession by force, the sheriff, though not bound to interfere *ex officio*, might assist at the request of the disseizee; yet he was to take care how he acted, as he would be subject to an assize, in like manner as the person whom he meant to assist; he might take a part in these matters, either as a private friend or officially as sheriff, to keep the king's peace.<sup>2</sup>

When the party disseized had neglected to avail himself of the authority the law gave him to recover possession while the injury was fresh

Assize of novel disseisin.

(a), he was then to recur to the recognition of assize; that compendious way for recovering possession, which became now more practised than ever.

Everybody who was a tenant of a freehold *nomine suo*

force and arms, although they hurt no one's body, all of them, nevertheless, are to be adjudged to corporal punishment; and if they cast him out of his dwelling-house, or out of his demesne, the felony is punishable at the king's suit or at the suit of the party, for no one is to be cast out of his house, where he dwelleth, and which he hath used as his own for a year, without judgment, though he hath no title thereto but by disseisin or intrusion; and it sufficeth for force and arms, or by the showing of arms, for to hurt the adversaries; and under the name of arms are contained bows, arrows, saws, lances, spears, staves, swords, and targets of iron (c. iii., s. 29).

(a) Here, again, the author follows Bracton, as the *Mirror* had followed him: "It is called 'novel' to put a difference from those which are ancient, for anciently kings used to go over the shires to hear, inquire, and determine offences, and to redress the wrongs there, and that afterwards, by reason of the multitude of offences; and, that kings could not do all by themselves, they sent their justices in eyre, who have not power to decide and determine a personal offence, but for a thing brought and not determined in the last eyre. And if the disseisin was before the eyre, then it was ancient; but if it were done since the last eyre, then it was a 'novel' disseisin" (c. iii., s. 25).

<sup>1</sup> Bract., 164.

<sup>2</sup> Ibid.

*proprio*, might have this remedy by assize; those therefore who were in possession, *nomine alieno*, as a guardian, an agent, the family of a man, or his servant, a *firmarius* or fructuary (not being a *feodi firmarius*), an usurer or guest, one who held from day to day or from year to year, or an usufructuary who held for a term of years, none of these could bring an assize, but that remedy was left to him who was the *dominus proprietatis*, out of whose fee all those interests issued. It is laid down gravely by Bracton, that should a man be ejected from his ship, *quasi de libero tenemento*, he was no more entitled to an assize than if he had been dragged from his horse or carriage, though he makes a question concerning an ejectment from a wooden house; to which he answers, that if it stood on his own land, whether adhering to the soil or not, an assize would lie; but if on the land of another, and there had been any prohibition or injunction against the building or removal, the person on whose land it was built might have an assize; if there had been none, and it had been removed without any contest, he could not have an assize.<sup>1</sup>

An assize lay not only against the disseizor, but against all his aiders and abettors, whether present or not; not only against those who did the fact, but against those in whose name it was done, or who, after it was done, concurred in or approved it; as by this avowal and ratification they seem to make themselves parties.<sup>2</sup> It only lay against those who were in some of the above ways parties to the fact and therefore not against an heir, or successor to the disseizor, who, though liable to make restitution, were not to undergo a penalty for the disseisin.<sup>3</sup> Nevertheless, where any of the parties died, or the assize had not been brought with such diligence as the law required, and the matter was not, by commencement of some proceeding, become *litigious*, as the lawyers called it; in such cases recourse was to be had, not to a writ of right as formerly, but to a remedy which had been lately invented, called a writ *de ingressu*, or writ of entry, which has been so often alluded to, and of which more will be said hereafter.<sup>4</sup>

The form of the writ of novel disseisin differed from

<sup>1</sup> Bract., 167, 168.

<sup>2</sup> Ibid., 171.

<sup>3</sup> Ibid., 172.

<sup>4</sup> Ibid., 175, 176.

that in Glanville's time in nothing but in the return; the limitation was still, notwithstanding the statute, *post ultimum reditum domini regis de Britanniâ in Angliam*; <sup>Form of the writ.</sup> <sup>1</sup> but the return was *usq; ad primam assisam cum justitiiarii nostri ad partes illas venerint*; according to the appointment of justices of assize as directed to be made by *Magna Charta*. It seems, that upon this writ pledges of prosecution were to be taken by the sheriff only in case they had not been found in the king's court or a promise given, which used in some instances to be accepted instead of pledges. The pledges were to be two at least, and such as were sufficient to pay the *miser cordia* to the king, if the complainant should retract or not prosecute his suit. If a husband and wife were complainants, two pledges were enough; and it was the practice to be contented with two, when there were more complainants than one, though it was thought safer that each should find two. Notwithstanding the clause commanding the sheriff *quodd faciât tenementum reseisiri de catallis* was still continued, this part of the writ, says Bracton, was never executed, but these were left to be estimated in the damages by the recognitors.<sup>2</sup>

The other directions of the writ were to be executed as follows:—In pursuance of *quodd tenementum faciât esse in pace*, etc., the sheriff was to see that the disseizor did not convey the land to any one, and that the disseizee made no entry thereon; and if an entry was made by any one, under any pretext whatever, he was to restore it to the true owner, so to remain till the next assize. As to sending the recognitors *ad videndum tenementum*, he was to cause a view to be had, not by one or two, but by the whole if possible, or at least by seven; for an assize could not, says Bracton, be taken by less than seven, though it might for particular reasons be taken by more than twelve.

The reason of a view was, that there might be a certainty about the matter in question, both for the guide of the jurors in swearing and the judge in giving judgment. The jurors were to see what the freehold was, whether it was land or rent, whether it was consecrated to the church or not, whether it was held solely or in common. They were to see that the complainant did not

<sup>1</sup> *Vide* vol. i., 453.

<sup>2</sup> Bract., 179.

put more in view than he had claimed in his writ, for then he would be amerced, though he might, if he pleased, put less. They were to see in what vill, in what *locus*, in what part of the *locus*, and within what bounds, the freehold lay. If it was a rent, they were to see the land out of which it issued (an assize being the remedy for rents in some cases where a distress failed), the like of common pasture. They were to view not only the land where the common lay, but also that to which it was appurtenant;<sup>1</sup> and thus, in all cases, the jurors were to have a view of the thing in question for their better information.<sup>2</sup>

It was the complainant's duty to attend and point out all the above circumstances to the jurors; and if he could not, and appeared totally ignorant of the matter, the writ of assize was lost, and the assize *cadit in perambulationem*, as they called it; that is, became, by consent of the parties, a perambulation to make a general inquiry concerning the locality, the metes and bounds of the land.<sup>3</sup> It was a rule, that could the complainant point out the *locus*, but not the precise part thereof, it was sufficient if he was proved by the oaths of the recognitors to have seisin anywhere in the *locus* alleged.

If either of the parties failed to appear at the day appointed before the justices, his pledges were *in misericordiâ*; if neither of them appeared, the assize was void, and all, both principals and pledges, were *in misericordiâ*. If the disseizor appeared and confessed the disseisin, as in so doing he acknowledged an injury which was against the peace, he was to be committed to goal. If the disseizor was absent, and the complainant present, together with the recognitors, though no one was present for the disseizor, the assize was still to proceed *per defaultum*; it being a rule, that the assize should on no account be delayed; in such case, however, the complainant was always examined as to the ground of his demand.<sup>4</sup> The complainant might, at the time of appearance, make a *retraxit* of his complaint; for which his pledges, as was before said, would be amerced, unless he obtained the license of the court for so doing.<sup>5</sup>

When both parties appeared in court, the writ was to be read, and the matter of complaint inquired into. Brac-

<sup>1</sup> Bract., 180.<sup>2</sup> Ibid.<sup>3</sup> Ibid.<sup>4</sup> Ibid., 182, 183.<sup>5</sup> Ibid., 182 b.

ton blames some judges who, immediately after hearing the writ read, would proceed to ask the party complained of, what he could say against the assize; he thought it hasty and premature to put a person to answer before the matter of the complaint was properly examined and established; for it was not yet known whether the proceeding was to be by an *assize* or by a *jury* (the distinction between which will be seen presently), whether the fact was a *trespass* or a *disseisin*; he thought, therefore, that, as in a question concerning the *proprietas*, the demandant was to show by what right he claimed: in like manner, in this suit, it was not sufficient barely to propound a complaint, but to show the *jus querelæ*, and how the complainant was entitled to make it.

The justices, therefore, for their own information, and to instruct the jurors, were to interrogate as to the particulars of the complainant's case; of what freehold he was disseized, whether land or rent, whether for life or in fee, whether by descent or purchase; of a rent, whether it issued out of a chamber or a freehold, whether for life or in fee; of the boundaries and size of the freehold, whether there was any ejectment from the freehold, whether it was by day or night, with arms or without, with robbery or without; and innumerable other circumstances which might constitute the merits of the case.<sup>1</sup>

When these inquiries had been made, then, and not till then, was the tenant to be asked if he could say anything why the assize ought to remain. The matter of such objection might be found in the interrogatories put to the complainant. If the tenant could show no cause why the assize should remain, but at once denied he had committed any disseisin, he simply put himself upon the assize, and the assize proceeded, as they called it, *in modum assisæ*, that is, upon the simple question of disseisin; and if the jurors were present, or seven of them at least, against whom there was no cause of exception, they proceeded to take the assize; if they were not present, the assize was deferred to another day, when they were to appear, and the assize was to proceed.

If the jurors appeared at the next day, then the exceptions to them were to be stated. These were of various

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<sup>1</sup> Bract., 184.

kinds. Bracton says, that was a good exception to a juror which would be a good one to a witness. One rendered infamous by having been convicted of perjury could not be a juror, according to the rule expressed in the English of those days, "*He ne es othes worthe that es enes gylty of oth broken.*" Any enmity against a party, any friendship with him, was a good exception (a). Being a servant, familiarity, consanguinity, affinity, unless the connection was equally with both parties; being of the same table or family; under the power of a party, so as to be benefited or hurt; owing suit or service; being counsel or advocate; all these, and many others, were good causes of exception

to jurors. When the parties had at length agreed upon a juror, they could not afterwards reject him; and when the number was complete, the assize proceeded, the first juror having taken the following oath: "Hear this, ye justices, that I will speak the truth of this assize, and of the tenement of which I have had a view by the king's writ" (altering these words where the subject was a rent, a common, and the like), "and in nothing will omit to speak the truth. So help me God, and these holy gospels." After this, the other jurors, in order, repeated the following words: "That oath which the foreman here hath taken,<sup>1</sup> I will keep on my part, so help me God, and these holy gospels."<sup>2</sup>

After the oath was taken in the foregoing manner, the prothonotary, for the information of the jurors, was to rehearse the effect of the writ, in the following way: "You shall say, upon the oath which you have taken, whether *N.* unjustly, and without a judgment, disseized *B.* of his free-

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(a) A juror could be challenged because he held land of the other party (*Year-Book*, 7 *Edward IV.*, 5; 3 *Henry VI.*, 39); so of a "gossip" or godfather (*Ibid.*, 10 *Henry VI.*, 24; 49 *Assize*); so for any direct relationship to one of the parties (1 *Edward IV.*, 63); so if he was favorable to the other party (10 *Henry VI.*, 10; 7 *Henry VI.*, 25; 20 *Henry VI.*, 40). In order to avoid the evils thus avoided in the king's court by challenges, causes were removed into that court from the local court, the court baron, or the court of the hundred; for it might be that all the tenants of a manor or a hundred were tenants of the other party (22 *Edward IV.*, 3); and then, in the king's court, the jury could be ordered to come from another vill, or hundred, the king's court having power to summon jurors from any part of the county (*Year-Book*, 31 *Henry VI.*, 39). And so if the case interested a corporation in the vill or the hundred itself, the jury would come from the next hundred (31 *Assize*, 19; 15 *Edward IV.*, 18).

<sup>1</sup> *Talis primus hic.*

<sup>2</sup> Bract., 184 b, 185 b.

hold in such a vill, after the last return of the king, etc., or not" (a). In this situation of things the justices were to say nothing towards instructing the jurors, because nothing had been said by way of exception against the assize; but the jurors were to retire into some secret place,

(a) It is to be observed that nothing is said about evidence, the reason being, that even in the time of Bracton (from whom all this is taken) the jurors were still considered as witnesses, and the course of procedure had not yet gone so far as to allow of evidence being adduced. The jurors, therefore, were left to decide upon their own knowledge, and of course great difficulties arose, for none of them, or only some of them, might know anything at all about the matter; and though, as they came from the vicinage, it was most probable that some of them might know something about it, it would probably be in a great degree hearsay, or, at the best, common understanding. The course of procedure taken in the almost certain contingency of the jurors either being in doubt or at variance among themselves upon the matter may well be illustrated from some passages in the *Mirror*, the author of which lived and wrote in the same age as Bracton. From these passages, it would seem that the course was this: that if no two among them could agree for the plaintiff, he failed, but that if any two of them could speak on his oath in his favor, then (unless others could speak positively the other way) that would suffice for the plaintiff, provided that it was found upon examination that they agreed as to what was the pith and point of the action. Thus it is said: "It is an abuse to count of so long a time (*i. e.*, in writs of right), whereof none can testify the hearing or seeing, which is not to endure generally above forty years. It is an abuse that they examine not the jurors, although they find at least two agree. It is an abuse to compel jurors — witnesses — to say that which they know not, by distress of fine and imprisonment, when they could not say anything. It is an abuse to use the words, 'to their knowledge,' on their oath, to make the jurors speak upon thoughts, since the chief words of their oath be that they speak the truth." Elsewhere it is said that two credible witnesses are sufficient, and the usage is that the affirmative party in aid of the court cause the nearest credible neighbors to appear in witness, so that there be twelve men at the least of the jury (of ancient time ordained to be of the assize), of which, if two are agreed, by verdict of them and of the others, or if, by good examination, all the jurors be of one assent, it is sufficient. And if not, or if all the jurors say generally that they know nothing, or doubt of the matter, or if they say not expressly against the defendant, or if they speak for the defendant, in such cases it is to be adjudged against the plaintiff that he proveth not sufficiently his case. And although the defendant would make other defence, he shall not be suffered to do so (*Ibid.*). It is added that only against jurors hold challenges, as witnesses, as that the juror has been convicted, or indicted, or be friend, cousin, or ally of the opposite party, or because he is within age, or has procured himself to be put on the jury; and if the challenge be denied, it is to be tried by the jurors. So elsewhere, in disseisin, if the jurors in petit assizes are agreed that one shall give their common verdict for all, and if they say that they know nothing, then the plaintiff shall receive nothing, because he proved not his case; and if they be of different opinions, they are not, therefore, to be threatened or imprisoned, but are to be severed, and diligently examined. And if two jurors be found to agree among all the rest, it sufficeth for him for whom they speak; and they are not to be examined upon the title, as it is sufficient for the judge to know if the plaintiff were disseized (c. iii., s. 24).

and there to converse with one another upon what they had in charge, and no one was to have access to them, or talk with them, till they had given their verdict; nor were they, on the other hand, by signs or words, to give the least intimation what their verdict was to be.

There often happened a difference of opinion between the jurors, in which case the court used, as it was called, to *afforce* the assize; that is, others, according to the number of dissenting voices, were added to the major part of the assize, and if they happened to agree, their verdict was held good; and the dissenting jurors were to be amerced *quasi pro transgressione*, says Bracton, as guilty of a sort of offence, in obstinately maintaining a difference of opinion.

When the verdict was given, judgment was delivered according to it, unless the jurors should have expressed themselves obscurely, and the justices were disposed to examine further into the matter; and should the jurors, or those who were added by *afforcement*, still be unable to declare plainly and fully what their meaning was, the method was either to get the parties to agree to the matter, or the judgment was adjourned into the great court, where it was finally to be determined. Another way of putting a point of doubt and obscurity into a course of examination, was by *certificate*, the nature of which will be explained hereafter. When the assize failed to give a plain and intelligible verdict, it was the office of the justices to endeavor to elucidate it by interrogation and discussion. If the jurors were entirely ignorant of the matter, then, as in the former case, others were to be added who knew the truth; and if, after that, the truth could not be got at, they were to give their verdict upon the best of their belief, according to their consciences.<sup>1</sup> Though it was commonly said, that truth was the province of the juror, and justice and judgment that of the judge; it seems, says Bracton, that judgment belongs to the jurors, inasmuch as they are to say upon their oath whether one man disseized another. But yet, as the judge is to give a just judgment, it becomes him diligently to weigh and examine what is said by the jurors, to see whether it contains any truth, that he may not himself be misled by their mistakes.<sup>2</sup>

If judgment was given for the complainant, the land

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<sup>1</sup> Bract., 185 b, 186 b.

<sup>2</sup> Ibid., 186 b.



was to be restored, with all its produce, received and to be received, from the disseisin to the time of the judgment; and, as the sheriff was commanded to keep the land in peace till the assize was taken, the disseizee was to recover damages for any unjust abuse or misuse of the land in that interval. The disseizor was to suffer certain penalties (*a*). He was to be *in misericordiâ regis*, in proportion to the nature of the disseisin; as, whether it was *cum armis* or without, so as the *misericordia* was never less than the damages: besides this, he suffered a penalty for the peace, if it had been violated. Again, if he had committed robbery with the disseisin, he suffered a triple penalty; for the disseisin, the *misericordia*; for the peace, imprisonment; and for the robbery, as it is termed by Bracton, a heavy redemption: he did not, however, lose life or limb, as the robbery was not prosecuted criminally. The disseizor, if he was the principal in the fact, was also to give to the sheriff, on account of his disseisin, an ox and five shillings; but those who were only in aid, force, or council, did not, in general, pay this mulct to the sheriff, though in some counties they did. The disseizor was also to render damages, to be estimated by the oath of the jurors, and further, if need were, or the jurors had been excessive, to be taxed by the justices. But the justices were not to estimate the damages at a larger sum than the jurors had, unless it was a very clear case that the jurors had taxed them much lower than was reasonable or proper.<sup>1</sup>

This liberty of increasing the damages was allowed to the judges, in order that disseisins might never escape the proper punishment of the law; for, in those times of disorder and oppression, there were many great men who would commit disseisins for the mere purpose of making

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(*a*) In the *Mirror* it is said to be an abuse that plaintiffs did not, as formerly, recover not only damages of the issues of the possession, but recovered costs as to the injury, and as much as one might lawfully (*i. e.*, reasonably) tax by the occasion of such a suit (*c. v., s. 1*). Elsewhere it is said: The jury ought to inquire of the damages—that is to say, of the profits of the tenements since the disseizure, and to whose hands such profits came, and of the charges, costs, and reasonable expenses which the plaintiff hath sustained in his recovery, and in all things, and how much he is damaged in distress of his goods and in his honor; and, the damages being assessed, it is to be awarded that the plaintiff recover his seisin, such as it is, according to the view of the recognitors, and the damages, and the disseizors are punishable according to their offences (*c. iii., s. 25*).

<sup>1</sup> Bract., 185 b, 187.

the most of the fruits and profits during the time they could keep their unlawful possession; and when they had raised great sums thereby, they could generally escape with a small *misericordia*, through the ill-placed lenity of jurors; who, when they, by their verdict, took from a disseizor the land, were unwilling to load him besides with heavy damages. For these reasons, it was expected that the justices should examine very carefully into the change that had been made on the land since the disseisin, either through the wilfulness or neglect of the disseizor, or any otherwise; all which he was to be compelled to make good, notwithstanding much of the damage might have happened by death of cattle and other accidents, which it was out of his power to govern; nor was any allowance to be made to a wrong-doer for improvements.<sup>1</sup>

This was the manner of proceeding, when nothing was said against the assize, nor any exception  
Exceptions to the assize. taken why it ought to remain, as it was called; but if the tenant did not choose to put himself upon the assize, he might *except*, or plead such matter as would cause it to remain, that is, defer it for the present, or perhaps entirely destroy it. These exceptions were, to the writ, to the person of the complainant or tenant, and to the assize. Some exceptions to the writ deferred the assize, but did not destroy it; some exceptions to the person of the complainant entirely destroyed the assize; some exceptions were peremptory as to one person, and deferred the judgment, but were not peremptory as to another; as where the complainant was not entitled to the action, but some one else. The order of stating exceptions was this: if the writ was not good, there could be no further proceeding; but if that was good, then they resorted to the person of the complainant, to see whether he was entitled to the complaint; then to the person of the tenant, to see if he was the person against whom the complaint should be made; and last of all to the assize, to try *si tenens injustè et sine judicio disseisiverit ipsum querentem de libro tenemento suo* in such a vill, after such a period of time.<sup>2</sup>

Thus, after the jurisdiction of the court was established, the tenant was to take his exceptions to the writ. Ex-

<sup>1</sup> Bract., 187.

<sup>2</sup> Ibid., 187 b.

ceptions to the writ were many; if there was anything faulty therein, a spurious seal, a rasure in a suspicious part, as where the names of the persons, or places, or things were written (for a rasure in the legal part was not so important as in these points of fact); if the date was at all changed; if the complainant had a former writ of mortuancestor, of entry, or of right, and so had not observed the order of writs. Again, any error destroyed a writ, though he did not destroy the assize. It was error, if the writ was against one who was possessed *nomine alieno*, as a *firmarius*. The assize could not proceed if there was an error in the name, as *Henricus* for *Wilhelmus*; and so in the cognomen, as *Hubertus Roberti* for *Hubertus Walteri*; so in the name of a vill whence a person took his description, as London for Winchester; even if the error was in a syllable, as *Henry de Brocheton* for *Henry de Bracton*; nay, even in a letter, as *de Bracthon*, for *de Bracton*; again in a name of dignity, as *Henry de Bracton præcentor*, when he was *decanus*; so of a thing, as *vineam* for *ecclesiam*.<sup>1</sup>

Then followed exceptions to the person of the complainant; one of which was villenage, and its consequences, excommunication; that he had not a freehold; that he should distrain instead of bringing this writ, and many others. The tenant might next except to his own person; as for instance, that the action should have been against his ancestor or predecessor, and not against him.<sup>2</sup> And last of all, having gone through exceptions to the writ and to the person, he might except to the assize, upon the circumstances of the case, by disputing how far the operative words of the writ were justified in fact; how far he *injusstè et sine judicio* — *disseisivit eum* — *de libero tenemento suo* — *in tali villâ*; every term of which charge was open to a variety of remarks and objections.<sup>3</sup>

All these exceptions, whether they were peremptory or dilatory, were equally *out of the assize* (which was merely to try the disseisin), and collateral to it; and therefore could not be determined by the recognitors of assize. We have seen, that in Glanville's time<sup>4</sup> such incidental matters were in general tried by duel, there being very few issues which are said by that author to have been

<sup>1</sup> Bract., 188, 189.

<sup>2</sup> Ibid., from 190 to 204.

<sup>3</sup> Ibid., from 204 to 212 b.

<sup>4</sup> Ibid., 146.

usually tried by recognition; of which one was, *infra ætatem vel non*; another was, whether seized *ut de vadio*, or *ut de feodo*, and some others; as that of villenage, which was to be tried by the relations, and if they could not agree, by the vicinage; the gift of a fee, after a grant of the advowson,<sup>1</sup> and others that may be seen in that reign; but, in general, points in debate that did not make the direct question of seisin, were tried by the duel. Since that time, the good sense of mankind, concurring with the statute made by Henry II. concerning trials by recognitors, had so far prevailed over the habits of their ancestors, that suitors used commonly, when a fact was in litigation between them in a cause, to consent that *the truth thereof should be inquired of by a JURATA, or jury*, in preference to a trial by duel; and they accordingly used to *pray* the court that it might be so; with which prayer courts had been so long used to comply, that a jury had become the regular mode of trying a fact in dispute in a judicial proceeding. Thus there had gradually arisen a new sort of trial by recognitors or jurors, denominated a *jurata*; which was a tribunal chosen by consent of the parties themselves, and, on that account, differing somewhat in its constitution, design, and effect, from the *assisa*.

To mention only one mark of their difference, and leave the rest to be observed as occasion presents them: the *jurors* in a *jurata* were not liable to conviction for perjury, nor to the infamous judgment as the jurors in the *assisa* were; the reason for which, according to Bracton, was, because the *jurata* was a trial which the parties had themselves prayed to have, and therefore they had no reason to complain of its determination; while the assize (to follow his idea) was a specific remedy in a special case, to which, and which only, the parties were by the law confined for obtaining redress; and if the ends of justice were disappointed by those recognitors who were designed by the constitution to further it, they deserved a very severe animadversion. But, with submission, the reason of the conviction being allowed in one case, and not in the other, was not, it would seem, owing to any particular difference in these two trials, as practised in the time of Henry III.,

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<sup>1</sup> Glanv., lib. 13, c. 20.

but because the constitution of Henry II. (a) had provided that punishment for recognitors in the particular *assizes* only, which were then invented. The devolving of questions upon recognitors to be tried by the consent of parties, was a practice that originated afterwards, and therefore was not within that provision: nothing can be a stronger mark of this trial not owing its existence to that famous law of Henry II. than the appellation of *jurata*.

The difference between *assisa* and *jurata* was a very common piece of learning in this reign. This distinction was always observed, and was never more nicely attended to, than when it happened, as it sometimes did, for an *assisa* to be called upon to discharge the office of a *jurata*; and, instead of deciding the direct point in the action, to inquire of some collateral matter. For when any issue arose upon a fact in a writ of novel disseisin, mortmain, and the like actions, which fact the parties agreed should be inquired of by a *jurata*; nothing was more natural, nor indeed more commodious, than, instead of summoning other recognitors, as in Glanville's time,<sup>1</sup> (b) that the *assisa* summoned in that action should be the jurors to whom they might refer the inquiry. This was generally the case; and then the lawyers said, *Assisa vertitur in juratam*.  
*cadit assisa, et vertitur in juratam*; the assize was

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(a) There was no such "constitution," nor does Glanville say there was. Glanville calls it, indeed, an institution, and, for the sake of flattery, calls it a royal institution; but there can be no manner of doubt that it was simply an ordinance or regulation of the chief justiciary: just as, in the time of the Conqueror, we find the king's justiciary ordering twelve men to be sworn to try a real action. That was an assize, for an assize was only trial by jury in a real action (*i. e.*, an action to recover real property), and the truth is, the institution had grown up by degrees, and had only been regulated by Glanville, who, all through, speaks of the recognitors as "jurors," that is, sworn triers on their own knowledge. And the distinction on which our author dilates in the text between a jury and an assize is futile, for they were different names for the same thing, the assize being a jury to try the right to seisin, the trial by jury being applicable to any issue.

(b) No trace of any such distinction can be found in Glanville, who, all through, speaks of "recognitors" as "jurors," and of the assize as a trial by jury. The assize was, as already shown, simply trial by jury in a real action, which had grown up since the Conquest, and was regulated by Glanville and elaborated by Bracton. And the formalities and subtleties in which Bracton indulges are simply illustrations of the tendency of men whose minds are cramped by a special study to overload it with senseless niceties and verbal distinctions. It is only to be regretted that our author should have wasted so much space upon them.

<sup>1</sup> Glanv., lib. 13, c. 20.

turned into a jury, and the point in dispute was determined by the recognitors, not *in modum assisæ*, but *in modum juratæ*.

Thus, then, the exceptions mentioned above would in this reign, as they were out of the assize, be determined, not *in modum assisæ*, but *in modum juratæ*: as it were, says Bracton, by consent of the parties; where one alleged one thing, and the other the contrary, and each prayed that the truth of what he said might be inquired of. And in this case, says he, there is no conviction; for if the other party would controvert the saying of the jurors, the law gave him full liberty to say that the *proof was false*; the verdict of the jurors in this case being only a *proof of the exception*; every one being to prove the truth of his exception, and the person who replied to it being also bound to prove his replication, in which recourse was had to the jurors, merely for want of other proof.

This will be made clearer by giving an instance. Suppose the complainant stated his case by saying, that he married a wife having an inheritance, and after her death he was in seisin till such a one unjustly disseized him, and so was in seisin *per legem Angliæ*, for he and his wife had children between them. If the tenant did not, in answer to this, deny the disseisin, and put himself on the assize, to try whether he disseized him or not, he might deny some of the circumstances which the complainant had stated as making his title: he might except that they had no child; or if they had, that it died in the womb; or if it was born, that it was a monster, and not a child; or if it was a child and born alive, that it was not heard to cry between four walls: when the complainant to such a plea replied the contrary, the truth of the allegation was then to be inquired of by the assize *in modum juratæ*. In the former case, of the general issue *disseisivit vel non*, the jurors, if they swore falsely, would be liable to conviction; in the latter they would not.<sup>1</sup>

The instances in which an assize might be turned into a jury were as numerous as the exceptions that might be taken to the complaint. We shall content ourselves with adding one more example to those already given; and this being a very particular one, deserves our notice. An

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<sup>1</sup> Bract., 215 b, 216.

assize was sometimes turned into a jury, *propter transgressionem*, on account of a trespass: as where a person made use of another's land against the owner's will; or where he used, as his own, the land of a person holding in common with him; these might be disseisins and trespasses both; for every disseisin was a trespass, though not every trespass a disseisin. If then the entry upon the stranger's land was without any claim of right, it was not a disseisin, but a trespass. But as it was uncertain *quo animo* this was done; the complainant used generally, in such case, to bring an assize as for a disseisin, and then the judge was to examine whether it was done with a claim of right: so that, if it should turn out that he made the entry through a probable error and ignorance, and under such mistake cut down trees, or the like, and did not do it in the name of seisin, he was cleared of the imputation of a disseisin, and it was considered rather as a trespass; for which, if he acknowledged the fact, he was to make amends; if he denied it, the assize was turned into a jury to inquire of the trespass.<sup>1</sup>

An assize was sometimes turned into a jury *propter transgressionem districtionis*, on account of a trespass committed in distraining; for a distress sometimes amounted to a disseisin, sometimes was only a trespass: and was accordingly determined, in the former case *in modum assisæ*, in the latter *in modum juratæ*. When an assize, therefore, was brought upon an injury suffered by a distress, if it could not be maintained as an assize to determine the disseisin, it might be maintained as a jury to determine the trespass.<sup>2</sup>

From what is here said, and the little mention there is in Bracton about any original specific proceeding in case of trespass, it should seem, that though there might be a writ of trespass, it was rarely brought for entries upon land; but the usual way of considering such matters was in an assize, where the complainant was sure of inflicting some penalty on the wrong-doer, either as a disseisor or a trespasser. It should seem that the writ of trespass was a late invention, not wholly approved by Bracton; for it is said in another part of this author's work, that the writ *quare vi et armis* a person entered land, would be bad,

<sup>1</sup> Bract., 216 b.<sup>2</sup> Ibid., 217.

because it would be making a question of the mode of the trespass, when it should be for the trespass simply.

To return to the assize of novel disseisin: This assize, according to Bracton, had three considerations: it was personal, *propter factum*; penal, *propter injuriam*; and thirdly, it was for restitution of the thing taken. As far as its object was penal (and *pœna suos tenere debet autores*), it did not lie for the heir of the disseizee, nor against the heir of the disseizor, if he died in the life of the disseizee; for the penalty was extinguished with the person, and the heir was not to be punished for the offence of his ancestor: nor, in like manner, would an action lie for the heir of the disseizee; for as between him and the disseizor there was no obligation *quoad pœnam*, though there was *quoad restitutionem*; but his remedy was by a writ *de ingressu*, since called a writ of entry. As to this writ of entry, and when it lay in the nature of an assize of novel disseisin, for an heir to recover possession, it was to be seen whether the ancestor had been properly diligent in procuring and prosecuting his suit so as to have got a view, and the jurors sworn; for then, by so doing, the assize of novel disseisin, in case of his death, was said to be perpetuated; that is, the right of action for the disseisin, so far as concerned the restitution, continued to the heir of the disseizee against the disseizor and his heirs. Some were of opinion, that, in this case, the action would hold *quoad pœnam* likewise against the disseizor; and though the assize was not prosecuted so far as the view, and electing the jurors, yet if as much diligence as possible had been used, though no action was commenced, the writ of entry was nevertheless continued to the heir of the disseizee *quoad restitutionem*.<sup>1</sup>

The form of the writ of entry, when brought after an assize, was as follows: *Præcipe A. quodd justè, etc., reddat B. tantum terræ cum pertinentiis in villâ, etc., in quam non habet ingressum nisi per C. patrem ipsius A. cujus hæres ipse est, qui prædictum B. inde injustè et sine judicio disseisivit, et postquam, etc., et unde assisa novæ disseisinæ summonita fuit coram justitiariis nostris ad primam, etc., et visus terræ captus, et remansit assisa capienda, eo quodd prædictus C. obiit ante captionem illius assisæ* (or, *antequam justitarii nostri in partes*

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<sup>1</sup> Bract., 218 b.



*illas venerint). Et nisi fecerit, etc.* These writs of entry, grounded upon a disseisin, varied according to the circumstances which had happened since the disseisin. One was, *in quam ingressum non habet nisi per C. filium et hæredem D. qui terram illam ei dimisit postquam idem D. injustè et sine judicio disseisiverit ipsum B., etc.* Another was, *in quam non habet ingressum, nisi per talem, qui injustè et sine judicio disseisivit talem postquam idem talis disseisiverat querentem.*<sup>1</sup>

In this writ the heir of the disseizor might have almost all the answers and defences which the disseizor himself, if he had lived, might have had against the assize of novel disseisin; inasmuch as this writ was in the nature of an assize of novel disseisin in all respects that regarded restitution, though not *quoad pœnam*; and all such matters would be determined by a jury. Bracton says expressly, that no corporal pain was to be inflicted by this action, on account of the disseisin of the ancestor; nor damages; nor was the customary ox to be given to the sheriff;<sup>2</sup> but only the *misericordia* was to be paid for the unjust detention.<sup>3</sup>

This writ of entry grounded upon a disseisin, like other writs of entry, was an invention since the time of Glanville, and was the result of that refinement which had pervaded all parts of the law relating to *seisin* and *property*. The earliest mention of these writs is in the third year of this king; when they are spoken of as in common use, and therefore it is probable that they were introduced not long after Glanville's time.<sup>4</sup> We shall have occasion to treat more particularly of these new writs in their proper place. The writ which next presents itself is another remedy concerning possession, which also had been contrived since Glanville's time (*a*), and has since been called the writ of *Quare ejecit infra terminum*.

(*a*) This particular form of remedy may have been framed since this, but, as already has been seen, there was a remedy before, for it is laid down distinctly in the *Mirror* that, as the assize of novel disseisin was a possessory remedy, it lay equally for a term or for years as for a freeholder. They were not so dull in those days as not to see that a term of forty years might be as good or better than an estate for term of life; neither were they so foolish as to afford no remedy for it. It is quite probable that some over-technical lawyer may have suggested a quibble upon the word "disseisin;" that, as

<sup>1</sup> Bract., 219.

<sup>2</sup> It seems that there was a custom for the sheriff to demand an ox for every disseisin proved.

<sup>3</sup> Bract., 220.

<sup>4</sup> Ibid., 219.

Such were the notions concerning land, that while one person had a freehold in a tenement, another <sup>*Quare ejecit infra terminum.*</sup> might, says Bracton, have at the same time the usufruct, the use, and the habitation.<sup>1</sup> As we have been showing how a man was to be restored to his freehold if he was ejected, we shall now see what was to be done if a person was ejected before the expiration of his term in the usufruct, use, or habitation of a tenement which he held for term of years. Such persons, when ejected within their term, used sometimes to bring a *writ of covenant*; but as that only lay between the person taking and person letting (who alone were parties to and bound by the covenant), and the matter could not be determined, if at all, but with great difficulty, in that way; provision was made, says Bracton, by the wisdom of the court and council<sup>2</sup> for a farmer against all persons whatsoever who ejected him, by the following writ: *Præcipe A. quodd justè et sine dilatione reddat B. tantum terræ cum pertinentiis in villâ etc., quam idem A. qui dimisit, etc.*, or thus: *Si talis fecerit te securam, etc., ostensurus quare deforceat, etc., tantum terræ cum pertinentiis in villâ, etc., quodd talis dimisit ipsi, etc., ad terminum qui nondum præterit, infra quem terminum prædictus, etc., illud vendidit, etc., occasione cujus venditionis ipse, etc., postmodum, etc., de prædictâ terrâ ejecit ut dicit; et habeas ibi, etc.*, or *Si A. fecerit te securum, etc., tunc summane B. quodd sit coram, etc., ad respondendum eidum A. quare injustè ejecit eum de tanto terræ,*

a termor was not seized, so he could not be disseized — a futile point, for the term “seisin” meant possession. However, there is reason to believe that some such technical difficulty had been raised, for the *Mirror* puts it as an “abuse to think that we cannot recover a term for years in manner of disseisin” (c. v., s. 7). In the chapter on disseisin, it is laid down that disseisin included deforcement, or *keeping out*, as well as ejection, or *pulling out*, and that it was “to disseize or eject a tenant as if one eject me out of my tenement, whereof I have had peaceable possession by descent of inheritance, or other lawful title to the possession. And note, that right is of two kinds: of possession or of property; and the right of property is not determinable by this assize as is the known possession, or that which altogether savoreth of a possessory right. And ejection, if of a term of years, falleth into this assize, which sometimes cometh by lease” (c. iii., s. 20). Now in what did the writ of disseisin differ from the writ of *quare ejecit terminum*, except that, to satisfy some captious clerk, the word disseisin was omitted, and the words “quod demisit” and “quod deforceat” were substituted.

<sup>1</sup> These terms *usufructus*, *usus*, and *habitatio*, are borrowed from the civil law; and there stand in as near a relation to each other as they are placed in here (*Inst.*, lib. 2, tit. 4, 5).

<sup>2</sup> *De concilio curiæ provisum.*

*etc., quam C. ei dimisit ad terminum qui nondum præterit infra quem terminum, etc.*

If this writ lay against a stranger *propter venditionem*, much more ought it to lie against the person himself who demised the land, if he ejected his own farmer. In such case the writ was, *quam C. de N. ei dimisit ad terminum qui nondum præterit, infra quem terminum prædictus C. de eâdem firmâ suâ injustè ejecit, ut dicit; et nisi fecerit, etc.*, and this was with little variation, the more common form in case of ejectment by a stranger. These writs were drawn in two ways, both of which we have noticed in the above instances; the one of a *præcipe*; the other two of a *si te fecerit securum*. The *præcipe* was thought the best and most compendious proceeding, on account of the process of caption of the land into the king's hands, which lay upon that writ; and the avoiding the tediousness and delay of attachments, which was the process upon the writ of *si te fecerit securum*, etc., though we shall see, in aftertimes, that the latter became the most common and best known of the two, being that which, from the words of it, was called a *quare ejecit infra terminum*.<sup>1</sup>

Thus have we gone through the remedies which the law had provided, where an injury was done to a man's seisin of a freehold. It follows next in Assize of common. order to speak of injuries done to a seisin of things appurtenant to a freehold, such as common of pasture, and the like. We have seen, that in Glanville's time there was an assize of common of pasture, by which the complainant might recover his seisin of a common, the same as seisin of his land; and that there was a writ directing an admeasurement of pasture to be made, where any one had surcharged the land. The forms of these two writs were the same now as in his time.<sup>2</sup> The writ of admeasurement was executed by the sheriff, who was to go in person to the place where the common lay, and cause the hundredors and all who were interested in the admeasurement to meet; and there, in presence of the parties to the writ, if they obeyed the summons to appear, and after hearing their allegations, he was to make inquiry, by the oaths of such neighbors by whom the truth could best be known, and by the inspection of charters and instruments, how the right

<sup>1</sup> Bract., 220.

<sup>2</sup> Vide vol. i., 453. Bract., 224 and 229.

was; and, according to that, he was to admeasure and allot the common.<sup>1</sup> This was the writ upon which admeasurements were usually made. But where a person overcharged his common beyond what his ancestors had ever claimed, the admeasurement used to be made by a writ, invented since Glanville's time, to the following effect: *Si A. fecerit, etc., tunc, etc., quodd sit coram justitiariis ad primam assisam, ostensurus quare superonerat, etc., aliter quàm C. pater ipsius B. cujus hæres ipse est, consuevit*: upon which the justices were to proceed as the sheriff in the former instance did, and a summary inquisition was made concerning the matter in dispute.<sup>2</sup>

Another writ had been introduced, called a writ *de quo jure*. Where a person had recovered seisin of a common in assize, grounding his title upon usage and sufferance merely; as this determined only the seisin, the chief lord might bring this writ to make the tenant show *QUO JURE exigit communiam pasturæ, etc., desicut ille nullam communiam habet, etc., nec servitium ei facit quare, etc., habere debeat, etc.*<sup>3</sup>

The writ in Glanville to the sheriff, commanding him that *præcipias R. quodd, etc., permittat habere H. aisiamenta sua, etc.*,<sup>4</sup> was preserved with some small difference in the form. He was directed, that *justicies R. quodd, etc., permittat H. habere rationabile estoverium, etc.*, as the case might be, of wood, turbary, and the like.<sup>5</sup>

As a nuisance, being an injury to a freehold, was considered in the nature of a disseisin, and like  
Of nuisance.
that might be redressed by an assize; so also, like that, it might, *flagrante facto*, be removed by the party injured without any ceremony of application to the law: but after the party had laid by, he had, as in case of a disseisin, no redress but by writ.<sup>6</sup>

There is no mention in Glanville of any other writ of nuisance than the assize. We find now several writs to the sheriff upon questions of nuisance. One of these was *Questus est nobis talis, quodd talis injustè et sine judicio levavit quendam murum* (or whatever it might be) *ad nocumentum liberi tenementi sui, etc., post redditum nostrum de Britannia in Angliam*:<sup>7</sup> *Et idèd tibi præcipimus, quodd loquelam illam au-*

<sup>1</sup> Bract., 229.      <sup>2</sup> Ibid., 229 b, 230.

<sup>3</sup> Bract., 231.

<sup>4</sup> Ibid., 229 b.      <sup>5</sup> Glanv., lib. 12, c. 14. *Vide vol. i., 439.*      <sup>6</sup> Ibid., 231 b.

<sup>7</sup> We have before seen that by the Stat. Mert. writs of novel disseisin were not to exceed *primam transfretationem domini regis qui nunc est in Vasconiam*.

*dias et postea eum inde justè deduci facias, ne amplius, etc.* In the same manner writs might be formed, *quare, etc., pos-travit injustè ad nocumentum liberi tenementi; quare, etc., viam obstruxit, etc., quare divertit cursum aquæ, etc.,* and so on, in numberless cases of injury and nuisance to a man's freehold.<sup>1</sup> These last writs authorized the sheriff to hear and determine the matter; and so were to all intents and purposes, writs of *justicies*, though that word was introduced only in the following: *Justicies, etc., quodd, etc., permittat H. habere quandam viam in terrâ suâ, etc.* The writ of assize of nuisance did not differ in form from those in Glanville, except in the return now used in all assizes, *coram justitiariis nostris ad proximam assisam.*<sup>2</sup> The proceedings upon this writ were the same as in an assize of novel disseisin of a freehold. So much were assizes of common and of nuisance considered in the same light as assizes freehold, that where either of the parties died after the injury done, and the writ was to be brought by or against the heir, we find a sort of writ of entry was formed, in the nature of those we before mentioned for recovery of lands: *Præcipe quodd, etc., reddat B. communiam pasturæ, etc. Præcipe quodd, etc., relevari faciat et reparari quoddam fossatum, etc. Præcipe quodd permittat talem relevare, etc.*<sup>3</sup> adapted, in the words of them, to the nature of the case, without any mention of an entry, which indeed would have been incoherent and absurd.

A nuisance was so much in the nature of, and approached so near to, a disseisin, that sometimes it might be considered in either light; and it was difficult to say which it properly was. Suppose a person caused water to overflow; if it rose upon the complainant's own freehold, which it most probably would if he had land on both sides, this was thought rather a disseisin than a nuisance; but if it rose only on the freehold of the wrong-doer, and from thence incommoded that of the complainant, it was then only a nuisance, because the fact was all in the wrong-doer's land. But if part was in one, and part in the other, and the water run over both grounds; then, for one part he might have an assize of novel disseisin of freehold; for

*Vide ante, 59.* Notwithstanding which, we find Bracton states this writ with a different limitation. It is not easy to account for this want of agreement between our author and the statute.

<sup>1</sup> Bract., 233.

<sup>2</sup> *Ibid.*, 253 b.

<sup>3</sup> *Ibid.*, 235 b, 236.

the other, an assize of nuisance; so that here would be two assizes on account of the same land; in which case, of the two remedies, if one was to be chosen, Bracton advises the assize of nuisance, as the most likely to remove the whole mischief: for the assize of novel disseisin, as it was confined to the freehold, could not correct the nuisance which was upon the other's land; while the assize of nuisance, by removing the cause, effected both.<sup>1</sup> A man might commit a disseisin and two nuisances, by doing one fact on his own ground. If he cut a ditch across a road which led to a pasture, he, at once, committed a disseisin of the common; caused also one nuisance by obstructing the way, and another by diverting the water from its proper channel.<sup>2</sup>

Among other nuisances, a liberty or franchise might be a nuisance to another liberty or franchise; as where the liberty of holding a market was granted, so as not to become a nuisance to a neighboring one. Now, a market was said to be *vicinum*, or neighboring, if it was six miles and a half,<sup>3</sup> and one-third of the other half distant from another; which distance was computed with a view to the following considerations: supposing a day's journey to be twenty miles, and the day was divided into three parts, the first part would suffice for the journey thither; the second, for buying and selling; and the third, for returning home in reasonable time before night. A market if raised within this distance, was to be put down; yet a market to be held two or three days *after* another, though within that distance, could not be said to be injurious; and, accordingly, a market was not considered as a nuisance,<sup>4</sup> unless it was held before or at the time of another.

Before we take leave of assizes of novel disseisin, it will be necessary to remark two or three particulars relating to them in general. If a disseisin happened *infra summotionem justitiariorum*, there was no need of applying to the *curia regis* for a writ; but the itinerant justices would make one themselves, in this form: *Talis de tali loco, et socii sui justitarii itinerantes in tali comitatu tali salutem. Questus est nobis*, and so on, as in other writs; only, instead of the term

<sup>1</sup> Bract., 234 b.

<sup>2</sup> Ibid., 234 b.

<sup>3</sup> *Sex leuca*. Spelman says, that in Domesday, and our old writers, *leuca* signifies a mile. Spelm., *Voce Leuca*.

<sup>4</sup> Bract., 235.

of limitation, these words were inserted, by way of giving jurisdiction to the court, *infra summonition emitineris nostri*.<sup>1</sup>

We have seen what provision was made by the statute of Merton in case of redisseisin.<sup>2</sup> If a person recovered seisin by judgment of the justices itinerant, and was put in seisin by the sheriff, and was afterwards disseized by the same disseizors; they, being convicted thereof, were to be taken and detained in gaol, till released by the king or otherwise; and for the purpose of taking the offenders there issued the following writ to the sheriff: *Monstravit nobis talis, quodd cum ipse recuperasset*; mentioning the assize, and so on; *ipse talis, etc., iterum, etc., disseisivit: et ideo tibi precipimus, quodd assumptis tecum custodibus placitorum coronæ nostræ, et 12 tam militibus quàm aliis liberis et legalibus hominibus, etc., diligentem facias inquisitionem, etc. (a). Et tunc ipsum capias, et in prisonâ nostrâ salvè custodias, donec aliud inde præceperimus, et inde tali seisinam suam rehabere facias, etc.* And, in like manner, in all cases where seisin was recovered in court, whether by assize, recognition, jury, judgment, concord, or otherwise, and the recoverer was turned out, a writ of *monstravit* to this effect might be had.<sup>3</sup>

Next, as to the writ of execution to give seisin to the complainant. When an assize happened, as it sometimes did, to be taken out of the county, and the person who brought the assize complained in the county that he had not yet got his seisin, there issued a writ to the following effect to the sheriff: *Scias quodd A., etc., recovered by assize; et ideo precipimus, quodd per visum recognitorum ejusdem assisæ, etc., plenariam seisinam habere facias, etc.,* the writ being still varied, according as the disseisin was confessed or otherwise. To every writ was added this clause: *Et etiam pro damnis ei adjudicatis infra quindenam facias ei decem solidos habere, ne inde clamorem audiamus pro defectu, etc.* If seisin had been recovered before the justices in the county, and

(a) Upon this the sheriff was judge, and the question was raised long after this whether he, being judge, his return of the jurors could be objected to, and it was held that it could not. "Suppose a redisseisin directed to the sheriff, there he shall be judge and also minister; and in the writ he will inquire of those who were of the assize, and others, and he also shall make process against them, and he is judge, and executes his own judgment; yet it is no challenge to his array that he is favorable, for he is judge, and it shall be presumed that he is indifferent" (*Year-Book*, 8 *Henry VI.*, fol. 21).

<sup>1</sup> Bract., 236 b.

<sup>2</sup> *Vide ante.*

<sup>3</sup> Bract., 236 b, 237.

the complainant was hindered from getting possession by the power of his adversary, he might have the following writ to the sheriff: *Questus est nobis, etc., quodd cum in curiā nostrā recuperāset seisinam, etc., idem, etc., non permittit eum uti seisinā suā; or seisinam suam nondum habet, secundum quod ei fuit adjudicata. Et ideo tibi præcipimus, quodd diligentur inquiras qui fuerunt recognitores ejusdem assisæ, et per eorum visum, etc., plenariam, seisinam ei habere facias, et ipsum in seisinā suā manuteneas, et defendas; or thus, non permittas, quodd talis ei molestiam inferat, vel gravamen, quominus idem, etc., uti possit seisinā suā, ne amplius, etc.*<sup>1</sup>

We have hitherto spoken of such remedies as were furnished when a person was disseized of his freehold, or of some easement and right appurtenant to his freehold, and arising out of that of a stranger. We are now to treat of appurtenances and rights which arise in a man's own ground; as of the seisin of a presentation; and when a person was impeded in the use and enjoyment of his own seisin thereof, or that of his ancestor. When a person presented to a vacant church, to which himself or his ancestors had before presented *tempore pacis* (for every one must have a seisin of his own, or of his ancestor who last presented), and was impeded or deforced by any one who contested the presentation; this was to be determined by an *assisa ultimæ presentationis*, as we before mentioned in the reign of Henry II.<sup>2</sup> As this assize could only be brought by one who had had seisin himself, or whose ancestors, to whom the advowson had belonged, had had seisin, those who held by feoffment, and not by descent, could not maintain it, unless they had, in fact, made one presentation: for they could not claim of the seisin of those whose heirs they were not, in an assize, any more than they could in a writ of right; nor could one who held for life, as in dower, or the like; all which persons were redressed by another sort of writ.<sup>3</sup>

The *assisa ultimæ presentationis*, or the writ of *darrein presentment*, as it was afterwards more usually called, differed in one or two particulars from that in Glanville's time. The present began, *Si talis te fecerit securum, etc.*, the former was a simple summons. The present was made returnable; sometimes, according to Bracton, *coram justi-*

<sup>1</sup> Bract., 237.<sup>2</sup> Vide vol. i., 448.<sup>3</sup> Bract., 237 b, 238.



*tiariis nostris ad proximam assisam* (notwithstanding the provision of *Magna Charta* to the contrary;<sup>1</sup> sometimes *apud Westmonasterium*.

The process on this writ was as follows: At the first day each party might essoin himself, if he pleased. If both made default, the suit failed, and the writ was lost. If the disturber only of the presentation was present, the judgment was, *quodd recedat sine die*. If the complainant only was present, then it was first to be seen, whether the disturber had been summoned, or not: if he had, and the summons was testified by the proper summoners, then he was to be re-summoned; but if he had not been summoned, or the summons was not proved, or, upon appearing, he objected that he had not been summoned, or the summons was not a reasonable one, another day was given him; and at that day, if the summons was proved, or not denied, there issued a writ of re-summons, by which he was summoned to hear the recognition that had been arraigned, with the addition of this clause, *et ad ostendendum quare non fuit coram, etc., sicut summonitus fuit, etc.* At the day appointed, if he made his appearance, he was not permitted to take such objection to the summons as would delay the assize, whether the first or second summons was proved or not, as the day had been appointed before, and he knew he was to be summoned; and if he did not come, the assize was taken by default, provided the jurors were present. If they were not present, then there issued to the sheriff a writ, which sometimes was *quodd venire facias, etc.*, sometimes, *quodd habeas corpora, etc.*,<sup>2</sup> for the jurors to be present at another day, at which time, if he did not appear, the assize would be taken by default.

Again, if, at the first day of summons, the tenant essoined himself, and had another day given, and did not appear at it, the assize was immediately taken by default, without any re-summons; also, if he appeared, and the jurors not, there was always one essoin on account of the appearance.

In this manner was a re-summons allowed when the

<sup>1</sup> Bract., 245.

<sup>2</sup> It does not appear from Bracton what rule governed in the application of one or the other of these writs; much less can it be collected that the *habeas corpora* never issued but after the *venire facias*, as was the course in later times.

assize was taken out of the county, or before the justices specially assigned. But before the justices itinerant in that county *ad omnia placita*, no re-summons, nor the delay of fifteen days, were allowed, if the tenant was in the same county with the church in question at the time of the iter, but the assize was taken by default, the same as an assize of novel disseisin.<sup>1</sup> Again, a re-summons was not allowed as against a person within age, nor a minor, nor where the tenant had been seen in court, and had contumaciously gone away. In short, in every assize but that of novel disseisin, there was at the first day either an essoin or a re-summons; but at another day, there was no re-summons after an essoin, nor, on the contrary, an essoin after a re-summons, but the assize was immediately taken by default as some said; and Bracton was further of opinion that even the essoin, *de servitio regis*, though it lay after an essoin and re-summons in every assize where they lay, would not hold in this assize *ultimæ presentationis*, which, as well as an assize of novel disseisin, was excepted from this essoin for the sake of expedition and despatch. We have been more particular in this account of the practice of re-summons, because it is applicable to all the remaining assizes of which we shall have to treat.<sup>2</sup>

If, after these summons, re-summons, and essoins, the deforciant did not come, would not answer, or contumaciously left the court, the assize, as we said before, was taken by default. If he appeared, and could say nothing why the assize should remain, it proceeded at once, the deforciant, in this assize, being allowed to call no warrantor, because the assize was taken generally for him who had the right of presenting.<sup>3</sup>

When the complainant and deforciant appeared, and the latter was disposed to say something against the assize, then, says Bracton, it became the complainant to state his case (or *profundare intentionem*, as it was called), and show what title he had to the action; after which the deforciant was to state his exceptions to the *intentio* of the complainant, and show why the assize should remain. The matter of the intention and exception was what constituted the merits of the title, and was collected

<sup>1</sup> Bract., 238.<sup>2</sup> Ibid., 239.<sup>3</sup> Ibid.

from the effective words of the writ: *Quis advocatus—tempore pacis—præsentavit—ultimam personam—quæ mortua est—ad ecclesiam talem—quæ vacat, cujus advocacionem dicit ad se pertinere*: that is, who was the real patron and owner of the advowson, and that he was not a guardian, or farmer or tenant for years, who possessed *nomine alieno*, or for life, or by intrusion, or disseisin; who, besides not being properly owners, had never, perhaps, presented, and therefore never had gained seisin of the presentation:—whether he obtained this right in times of quiet and peace, and not by usurpation and oppression: whether the presentation was rendered complete by institution: for, since the Constitution of the Council of Lateran, ordaining that presentations should lapse to the bishop if the patron did not present in six months, had been adopted in our law, it oftener happened that presentations, not being in time, were disputed:—whether it was a parson that was presented; for an assize did not lie of a vicarage or prebend, nor of a chapel: whether his death was natural or civil, as by entrance into religion, resignation, or, what was the same, marriage, or any other act which disabled him from holding his church; and whether it was vacant. The question of vacant, or not, was to be determined by the ordinary, who was the proper and legal judge thereof.<sup>1</sup>

From the above-mentioned articles of the writ might be extracted exceptions, both to destroy and defer the assize; but should the deforciant admit them all, he might still except against the assize in various ways. He might say, that the complainant who grounded his assize upon the seisin and presentation of his ancestor, after that presentation made a gift of the advowson, either by itself, or with the freehold to which it was appendant, to the deforciant himself, by a charter, which he there produced; and therefore, that though the ancestor might present, yet he could not for that reason present after. To this the complainant might reply, that after the charter mentioned he presented *N.*, who was admitted, so that the charter was void, and the gift null; and this he could prove by the assize taken *in modum juratæ*, unless the deforciant chose to make a *triplicatio*, or

Exceptions  
thereto.

<sup>1</sup> Bract., from 240 to 242.

rejoinder, and say, that though that charter might be void, and the gift null, by such second presentation of the donor, yet after such second presentation, he made another charter to him confirming the former, which had been invalidated by the second presentation: and this he might offer to prove by the assize and witness named in the charter, if the other party simply denied the charter and confirmation, and did not choose to go on by a *quadruplicatio*, or sur-rejoinder, and say, that after all which was stated, he had since made another presentation.<sup>1</sup> The sense of all this pleading was, that the last exercise of right by presentation overbalanced every consideration arising from the right to make that presentation; and so stood the law, conformably with that deference which was universally shown our old jurisprudence to seisin, or possession, whatever the right to that seisin and possession might be.

It might be excepted that the complainant had aliened the land to which the advowson was appendant, *cum omnibus pertinentiis*, or that he had not in his hands any part of the freehold to which it was appendant, but had lost it all by judgment or by disseisin: for though he might have a right to the freehold and its appurtenances, he was first to recover that before he could present.<sup>2</sup> These and many other matters might be excepted against the assize.

Nothing can better show the nature of this assize, how far it had effect, and where it failed, than some cases determined in this reign. In one of these it was held, that when it could not be proved who made the last presentation, nor the next before, nor the next before that, the plea should proceed upon the mere right and property, by that same writ of assize, without recurring to any writ of right: a *narratio*, therefore, or count, was immediately to be made of the seisin of an ancestor, and of the right descending to the demandant, as if it had been, *ab initio*, a suit upon the right; and the tenant might, as he chose, put himself upon the great assize, or defend himself by duel. Another case was this: Suppose a man had an advowson of a church, and being in seisin of the presentation, gave it in marriage, and afterwards, before he made any presentation, the donee gave it again to another, and then the church for the first time became vacant;

<sup>1</sup> Bract., 242 b.

<sup>2</sup> Ibid., 242 b, 243.

upon which the donor, the first donee, and the second donee, all presented: in this case, the donor would, in an assize for the presentation, be preferred to the other two; for the first donee had no true seisin, so as to transfer the advowson to another; nor could the second donee receive what the first could not give him: and so it was determined in more cases than one, that where a person to whom an advowson was given conveyed it away before he had presented to it, the conveyance was null, because there was no remedy to give it effect.<sup>1</sup>

As persons, in the foregoing instances, having presentations, could not go upon any seisin of their own or their ancestors; and in all cases, as <sup>of quare im-</sup> <sup>pedit.</sup> those who had by any lawful means acquired a right of presentation, whether by gift or by judgment, for life or in perpetuity, would, if they had not presented before, have been unable to maintain their right in an *assisa ultimæ præsentationis*, or a writ of right of advowson; remedies had been devised some time in this reign by two writs, one called *quare impedit*, the other *quare non permittit*, for so Bracton calls it, though the words of the writ are *quod permittat*. The difference between these two writs of *quare impedit*, and *quare non permittit* is thus explained by Bracton: *Impedire est ponere PEDEM IN jus alienum, quod quis habet in jure præsentandi*. When a right, whatever it might be, was accompanied, not with a proper seisin, but a *quasi seisin*, in such case the remedy was by *quare impedit*. But if the person presenting had not even this *quasi seisin*, but clearly none at all; as where a right of presentation accrued by donation, or by reason of a tenement holden for life, as in dower, or *per legem terræ*; or to a farmer by reason of his farm; to a creditor by reason of a pledge, where no seisin nor *quasi seisin* was had; there, as no one could be said, *ponere pedem in jus*, or in a *quasi seisin* (which the person in fact never had), a *quare impedit* would not hold, but recourse must be had to the *quare non permittit*, which purported that the person who had the property, or *proprietas*, did not permit him who was in possession to use his *jus possessionis*.

The writ of *quare impedit* was as follows: *Quia A. fecit nos securos de clamore, etc., pone per vadium, etc., ad respon-*

<sup>1</sup> Bract., 245 b, 246.

dendum eidem A. QUARE IMPEDIT eundem A. præsentare idoneam personam ad ecclesiam de M. cujus ecclesiæ advocacionem idem A. nuper in curiâ nostrâ coram justitiariis nostris apud Westmonasterium recuperavit versus eundem B. per judicium curiæ nostræ; unde idem A. queritur quodd prædictus B. injustè et contra coronam nostram, or in contemptum curiæ nostræ eum inde IMPEDIT: et habeas, etc. This was the form of the writ of *quare impedit*, which has rather the appearance of a writ of execution, or at least a judicial process to enforce a judgment in some action, than an original writ. The writ of *quare non permittit* was as follows: *Præcipe A. quodd*  
*quare non per-* justè et sine dilatione PERMITTAT B. præsentare  
*mittit.* idoneam personam ad ecclesiam, etc., quæ vacat et ad suam spectat donationem, ut dicit; et unde queritur quodd prædictus A. eum injustè impedit. Et nisi fecerit, et idem B. fecerit te securum, etc., tunc summane, etc., quodd sit coram justitiariis nostris, etc., ostensurus quare non fecerit, etc. From the comparing of these writs, it seems, says Bracton, that the *quare impedit* and *quare non permittit*, come to the same thing,<sup>1</sup> in which observation later times have agreed with him; for the writ of *quare impedit*, which seems to have been very recently introduced, and in a very unfinished state, soon became obsolete,<sup>2</sup> and the *quare non permittit* was continued, and is still in use, under the name, however, of *quare impedit*.

The process in this writ was as follows: If the party did not appear to the summons on the first day, nor essoin himself, then the old practice (before the Council of Lateran, when no time ran in case of vacancy of churches) was to attach the impeters by pledges, and so on by better pledges, and to run through the whole solemnity of the process by attachment; but since that time, the courts had got into the usage of proceeding with more despatch; in a way, says Bracton, not warranted by law, yet, as he admits, such as was excused by the necessity of the case, which required that a lapse should be prevented, if possible. This was, in the first instance, to distrain the impeter, either by directing the sheriff, quodd habeat corpus ejus, or quodd distringat eum per terras et catalla,

<sup>1</sup> Bract., 247.

<sup>2</sup> Vide 2 West., 13 Edw. I., c. v., where a writ of right, of *ultima præsentationis* and *quare impedit*, are mentioned as the only original writs to recover advowsons.

*quodd manus non apponat, or quodd faciat eum venire. Hoc,* says Bracton, *provenit non per judicium, sed per concilium curiæ,* to disappoint and punish the malice of those who hindered presentations in order that lapses might happen.<sup>1</sup> It seems this process was warranted by the order of the court merely, and it is spoken of by Bracton as an intrenchment on the regular course of proceeding, that was to be excused by the nature of the case. The legislature at length interposed to authorize this proceeding, and settled it somewhat in the manner it is here stated.<sup>2</sup>

If the impeder was within age, and had nothing by which he might be distrained, then the person in whose hands he was, and by whose advice he was directed, was to be summoned: *Ibi habeas B. qui est infra ætatem, et in custodiã tuã, etc., ad respond, etc..*

It was the opinion of some that the patron only was to be summoned, and not the clerk, because he claimed nothing in the advowson. But in truth, says Bracton, it was first to be seen, whether it was the patron or the clerk that caused the impediment; for both might be impeters at different times; the patron before he lost the presentation by judgment, and the clerk by afterwards insisting on it: and in this case, the clerk was to be summoned as a principal impeder, and the patron only incidentally, to show what right he could claim in a presentation which he had once lost by judgment of law. If a patron caused a clerk, properly instituted, to be summoned for impeding his presentation, he might answer, that the church was not vacant; which would be tried by the bishop; or he might say, that he claimed nothing in the advowson, nor impeded any one by presenting, but that he himself was already in possession, and therefore that the church was not vacant.

Lest the bishop should put an incumbent into the church, *pendente lre*, before the six months elapsed, there used to go an inhibition *ne incumbaret, or ne clericum admittet, etc.,* so that the bishop could not afterwards admit any one till the suit depending was determined. If, however, the last presentation was determined in one suit, and another was depending upon the right, the

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<sup>1</sup> Bract., 257.

<sup>2</sup> By the Stat. Marl., 52 Hen. III., c. xii. *Vide post.*

bishop was to admit a clerk presented by him who had the last presentation, notwithstanding the prohibition.<sup>1</sup>

When a person recovered seisin by assize of darrein presentment, by *quare impedit*, or *quare non permittit*, there went a writ to the bishop *ad admittendum clericum*, which usually stated the record and judgment in the action. When these writs were occasioned by either of the two last actions, there was a clause inserted, which was left out in that which issued after an assize; and as this shows a remarkable difference between these actions, it may be worth noticing. In the case of a *quare impedit*, and *quare non permittit*, a clause was inserted in this writ, which directs that the clerk should be admitted *non obstante reclamazione talis*, naming the unsuccessful party. Now, as a *quare impedit* and *quare non permittit* were actions between certain parties, who were to abide the judgment given between them, neither ought to resist the execution thereof, and such a clause was very proper. But in an assize of darrein presentment it was otherwise; for though the suit was between certain parties, yet the assize was not only to inquire of their right, but of that of any other persons whatsoever; the writ directing the jurors to recognize generally *quis advocatus, who*, and not whether either of the parties only, made the last presentation; and therefore it would be in vain to say, *non reclamante*, the persons named in the writ, when any other person might resist it if the assize declared for him, though he was not named in the writ.<sup>2</sup> When this assize was taken *in modum juratae*, the issue in such case not being *quis, etc.*, but on a collateral fact, then this clause was inserted.

If the clerk of the patron who lost in the assize instituted any suit against the other clerk in the spiritual court, there went a prohibition to stop it, as we before saw in Henry II.'s reign.<sup>3</sup> Should the bishop neglect to obey the writ *ad admittendum clericum*, there issued another of *quare non admisit*, upon which lay the process of attachment, and upon this inquiry might be made into the reasons and propriety of the delay.<sup>4</sup> Thus far of these writs of possession concerning presentations. The writ of right of advowson belongs to another place.

<sup>1</sup> Bract., 247 b, 248.

<sup>2</sup> Ibid., 248 b.

<sup>3</sup> Bract., 250 b. *Vide ante*, 409.

<sup>4</sup> Ibid., 251 b.



And now we have gone through the remedies the law provided, where a man was disturbed by violence or otherwise from his *own proper* seisin. We are next to speak of the seisin of *another*, the principal of which is, that of an ancestor: in such case, the method in which the next heir might recover was by *assisa mortis antecessoris*.

The writ of *mortis antecessoris* preserved now the form it had received in Glanville's time,<sup>1</sup> with the single variation of the return, and limitation. *Assisa mortis antecessoris.* The limitation, according to the alteration made by the Stat. Merton, was, *si obiit post ultimum reditum regis Johannis patris nostri de Hiberniâ in Angliam*; the return was, *coram justitiariis nostris ad primam assisam, cum in partes illas venerint*: though to these variations it may be added, that whereas in Glanville's time it seems to have been only on a father's dying seized, it was now extended further, to the death of a mother, brother, sister, uncle, and aunt.<sup>2</sup> These were the degrees within which an assize was limited; for a proper writ of mortancestor never was allowed so high as the grandfather (though there was a writ *de morte avi*, and *avix*, which Bracton calls partly a mortancestor, and partly a writ *de consanguinitate*), nor in descent so low as the grandson; no assize being allowed of the death of one or of the other, though a grandson might have an assize of the death of his uncle or aunt, as before said. Again, this assize would not lie *inter conjunctas personas*, as brothers and sisters, grandsons and granddaughters.<sup>3</sup> We shall afterwards see how the writ *de consanguinitate* was framed to supply some of these defects.

In an assize of mortancestor the process was a re-summons, in the same manner as was before mentioned in the assize of darrein presentment; and if at length the parties appeared, but the jurors did not, then there was an award, that *ponatur assisa in respectum pro defectu juratorum*; and they were called together again by a *habeas corpora juratorum*, just as was stated in that assize.<sup>4</sup> It appears in Glanville's time that the tenant was not to be waited for after the first summons.

When both the demandant and tenant appeared in court, the tenant might call a warrantor—a privilege which

<sup>1</sup> Bract., 178.

<sup>2</sup> Ibid., 254-261 b.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid., 255, 255 b, 256.

Glanville does not mention as allowed in this writ; upon which there issued a summons *ad warrantizandum*. If at the day the demandant and tenant appeared, but the warrantor made default, then the assize was taken by the default of the warrantor; nor was any process of distress by caption of his land, or otherwise, allowed against the warrantor, till the assize was taken, and it was known whether the tenant lost or retained his land, and so whether he needed any recompense from his warrantor; and even should the assize not be taken on that day for want of jurors, or for any other cause, and the warrantor appeared before it was, yet, notwithstanding, he would not be heard till the assize had first been taken. If the tenant lost by the assize, they proceeded against the warrantor, and distrained by the writ of *CAPE in manum domini regis, etc., deterrâ ipsius A. ad valentiam terræ, etc., quia B. recuperavit versus, etc.* If the warrantor appeared in obedience to this compulsory process, he either entered into the warranty, or pleaded he was not bound to give a recompense in value; for this obligation of his warranty was the only point which he could now deny, it being in vain to say anything about the other of defending him in his seisin: that being lost by the assize. If he could not defend the recompense in value, he was immediately to make the usual satisfaction to the tenant.

If the warrantor appeared at the first day, he either entered into the warranty, or showed why he did not. If he entered into the warranty, he might make all the answers and exceptions the tenant might; and he became, in fact, the very tenant. He might call others to warrant him; and if the last warrantor could not deny his warranty, or the assize was taken by his default, he was to give a recompense in value to his feoffee, and that feoffee to his, and so on, to the tenant in the action.

When the warrantor denied that he was bound to warrant, no other penalty, as we said before, was inflicted on the tenant, but that the assize was taken by default; and this was the great difference between the situation of a tenant under these circumstances in an assize of mortuance, and in a writ of right: and with reason; for in the assize, the warrantor was only to defend against the assize, by saying something to show that it ought to remain; and if he could not say anything to that effect, the

assize proceeded of course, and the question was only upon the possession : whereas, in a suit *de proprietate*, the warrantor was called to answer to the demand, and defend the very right ; and he was bound to show that the demandant had no right ; and if he could not do this, there was a judgment, that the land should be lost for want of a defence.<sup>1</sup>

When the demandant stated his *intentio*, he was then to establish and prove, by the assize *in modum assisæ*, all the articles of the writ, namely, *quodd talis antecessor*, of whose seisin he claimed, *fuit seisitus in dominico suo, ut de feodo, die quo obiit*, and *post terminum*, etc., which was the limitation in these writs ; and if he failed in one of these articles, the assize was as much lost as if he had failed in all.<sup>2</sup> To all or some of these the tenant, if he could not call a warrantor, as before stated, might answer and make his exceptions, showing why the assize should not proceed ; and for proof of what he said, was (as in the other assizes) to put himself upon the assize *in modum assisæ*, or *in modum juratæ*, according to the nature of the allegation : for this assize, as well as that of novel disseisin, was sometimes turned into a jury, to try the truth of such collateral facts as might be alleged against the assize proceeding. The sort of facts which would occasion this change, and the manner in which it was conducted, it would now be unnecessary to enumerate particularly, after what has been said on the assize of novel disseisin. The writ of *seisinam habere facias* was various, according to the circumstances of the proceeding in court : whether the recovery was by the assize, by judgment, by confession, it was always so mentioned : *Scias, quodd A., etc., recuperavit, etc., per assisam, etc.*<sup>3</sup>

We shall therefore conclude what we have to say upon the writ of *mortis antecessoris*, by showing between what persons it would hold, and adding Where this writ would lie. a few remarks upon the instances where it was not allowed. The reason of confining this writ within certain degrees was an anxiety, lest by extending it further, questions *de proprietate* might be sometimes determined by an assize, which was a proceeding only designed for disputes about the possession. This writ would not lie between *conjunc-*

<sup>1</sup> Bract., 257 b. to 261.<sup>2</sup> Bract., 261 b.<sup>3</sup> Ibid., 256.

*tas personas*, as co-heirs, whether they were parceners, that is, capable of taking an inheritance descending from a common ancestor, or not capable; for if they were co-heirs capable of taking, that is, if the inheritance was partible, as among daughters, or, by particular custom, among the sons, recourse was to be had to the writ *de proparte*; and if, in such case, an assize was brought, it would be lost by the exception of the mere right, as each of them was the *hæres propinquior* to his own share, compared with those in a remoter degree. And again, where they were co-heirs (who were by law considered *quoad seisinam* as *justi et propinqui*), though not parceners, or capable to take, as above supposed, but one of them, to whom the *jus merum* descended, was preferred to the others; yet, even in this case, the assize would not lie, as it only would determine the possession and seisin, respecting which they were considered all equally *justi et propinqui*; but recourse was to be had to the writ of right, which determined both the seisin and the mere right.<sup>1</sup>

As this writ would not lie between co-heirs that were legitimate, capable or not capable, so neither would it between legitimate and natural children; for if it was objected to a natural brother that he was a bastard, or a villein, though he should prove himself legitimate and free, he would not thereby prove himself *hæres propinquior*, which must be done before the right could be decided; and therefore, as that could not be in this assize, they must resort to the writ of right.<sup>2</sup>

It had been said by Glanville, that this assize would not lie in burgage-tenure,<sup>3</sup> on account of a particular law, the effect of which law we may guess at, when we learn from Bracton that the reason of this was because many boroughs had a particular custom, which enabled the burgesses to make wills of land; and where that prevailed, it was to no purpose to inquire by this writ, whether the ancestor died seized. He says that the free-men of London<sup>4</sup> and burgesses of Oxford could make wills of their land, as of a chattel, whether they had such land by purchase or descent. In some places, this custom was confined to land purchased.<sup>5</sup>

We have seen that the assize of mortdauncestor was

<sup>1</sup> *Seisinam et merum jus*.

<sup>2</sup> Bract., 278 b.

<sup>3</sup> *Vide* vol. i.

<sup>4</sup> *Barrows Londini*.

<sup>5</sup> Bract., 272.

limited within certain degrees, and lay only against certain persons, on the death of certain persons, beyond which recourse was to be had to a writ <sup>A writ de consanguinitate.</sup> of right. To prevent this, in questions of seisin which could be proved *de proprio visu et auditu*, there had lately been contrived, in aid of this assize, the writ *de consanguinitate*, which was to determine questions of possession in such degrees and persons to which the assize did not extend within the time of limitation prescribed to the assize. This writ lay only of such things as the deceased died seized of *in dominico suo, ut de feodo*, and not those he died seized of *ut de mero jure*; it being designed to go only upon the possession, to avoid the hazard of the duel, and of the great assize. As this writ came in the place of the assize, and had for its object the seisin of the ancestor, there was every reason why it should pursue the nature of its original, as nearly as possible. It therefore observed the time of limitation in the old writ, and was confined to the same persons to which that was. Thus, though this writ exceeded the degrees of the assize, as it extended to the grandfather, great-grandfather, and higher in the ascending line; and in the descending, to the grandson, great-grandson, and lower; it, nevertheless, did not lie between such persons as the assize did not, as between co-heirs and the like; according to the rule, *inter quascunque personas locum habet assisa infra suos limites, inter eandem locum habet consanguinitas*; and *vice versâ*.<sup>1</sup> And if the time exceeded the limitation in a writ of *mortis antecessoris*, the writ of consanguinity would not hold, as the demandant could not by possibility, at such a length of time, prove the seisin *de visu et auditu proprio*, but only *alieno*, that is, of the father of the witness, who saw it, and enjoined his son to witness it thereafter, which sort of testimony could only be received in a writ of right.<sup>2</sup>

This was the origin and the nature of the writ *de consanguinitate*, the form of which was as follows: *Præcipe A. quòd justè et sine dilatione reddat B. terram, etc., cum pertinentiis in villâ, etc., de quâ C. consanguineus* (or it might be expressed specially, as *avus*, or *nepos*) *ipsius B. cujus hæres ipse est, fuit seisitus in dominico suo, ut de feodo, die quo obiit, ut dicit. Et nisi fecerit, and B. fecerit te securum, etc., tunc, etc., etc.* After

<sup>1</sup> Bract., 267.<sup>2</sup> Ibid., 281.

the essoins, and both parties appeared in court, the demandant was to propound his *intentio* in this way: *B. petit versus A. tantam terram cum pertinentiis in tali villâ, ut jus suum, et unde talis consanguineus suus, cujus hæres ipse est, fuit seisitus in dominico suo, ut de fædo, die quo obiit; et de ipso tali descendit jus prædictæ terræ cuidam tali filio et hæredi:* and thus he was to deduce the descent, as in a writ of right, down to himself; and then add, *et quodd tale sit jus suum, et quodd talis consanguineus ita fuit seisitus, offert, etc.*, he made an offer to prove: to which the tenant answered in this way: *Et A. venit, et defendit jus suum, etc., et dicit, quodd non debet ad hoc breve respondere, quod, etc.*,<sup>1</sup> which scrap of pleading may be noticed, as well for illustrating the action we are now upon, as to give the first instance that occurs of the formal parts of a record; many such will present themselves before we have done with this reign. It must be remembered that Bracton says this action was an assize, and might, like others, be occasionally turned into a jury. All those exceptions might be made to it which lay in the assize of mortaucestor.

It is stated as a question by Bracton, whether this writ could by means of the *narratio*, or counting upon it, be turned into a writ of right, as a writ of entry might; as for instance, if the demandant in a writ *de consanguinitate*, in counting his descent, *et unde talis consanguineus suus obiit seisitus in dominico suo, ut de fædo*, should then add, *et de jure*; this, Bracton says, would be going from the possession to the *proprietas*: for in saying, *talis obiit seisitus in dominico suo, ut de fædo*, the *jus possessionis* only was brought in question; and when he adds, *de jure*, he brings likewise in judgment the *jus proprietatis*, which made the *jus duplicatum*, or *droit droit*.<sup>2</sup> But as the writ *de consanguinitate* was, in its nature, only a possessory remedy, the demandant, by counting of the mere right, would go beyond the design of it; and therefore the writ would be destroyed, and the party have no remedy left but the writ of right. Again, by the same reason, a writ of right could not, by the way of counting, be turned into a writ *de consanguinitate*, as a person who had once commenced a suit upon the right, with effect, could never go back to an action upon the possession only. But a writ of entry, as it was in

<sup>1</sup> Bract., 281.

<sup>2</sup> Vide ante, 114.

*jure proprietatis*, might sometimes become a writ of right, on account of the entry being too ancient to be proved *proprio visu et auditu*: and again, a writ of right might become a writ of entry, when the entry could be proved *proprio visu et auditu*. But of this we shall have occasion to say more hereafter.<sup>1</sup>

An assize of mortauncestor did not lie for a right of common, of the seisin of an ancestor; in lieu of it, therefore, a writ of *quodd permittat* had been formed: *Præcipe, etc., quodd, etc., permittat talem habere communiam pasturæ, etc., de quâ talis pater, or avunculus, or consanguineus, cujus hæres ipse est, fuit seisitus de fædo tanquam pertinente, etc.* And in like manner for a successor: *Præcipe, etc., quodd, etc., permittat A. rectorem talis ecclesiæ, etc.* These two writs were possessory, as well as the former; and the mere right could not be discussed in them.<sup>2</sup> They were likewise always determined by a jury, and not in the way of an assize.

There was a writ which partook of the nature of an assize of *mortis antecessoris* and of novel disseisin, to summon a person *ostendendum quo warranto se teneat in tantâ terrâ, etc., quam A. pater ipsius B. recuperavit versus eundem C., etc., et de quâ fuit seisitus ut de fædo, die quo obiit, etc.* The like in case of a common.<sup>3</sup>

It was not the practice to allow damages to be recovered in an assize of mortauncestor, which Bracton laments as an encouragement to chief lords to commit waste and destruction on lands which they seized at the juncture of a tenant's death. We have before seen that a chief lord was more commonly an object of this assize than persons of any other description.<sup>4</sup>

The next and last remaining assize was the *assisa utrùm*, to try whether a fee was lay or ecclesiastic.<sup>5</sup> But before we enter upon this, let us turn back *Assisa utrùm.* for a while, and review these assizes, in the first mention of them by Glanville, and as they were now treated by Bracton. This proceeding was in Glanville's time called *recognitio*; and, in speaking of the recognitions upon seisin, he enumerates the recognitions then in use in the following way: There were, says he, the recognition *de morte antecessoris*; that, *de ultimâ præsentatione*; that, *utrùm aliquod*

<sup>1</sup> Bract., 283 b., 284.<sup>2</sup> Ibid., 285.<sup>3</sup> Ibid., 336.<sup>4</sup> Ibid., 284, 284 b.<sup>5</sup> Vide vol. i., 369.

*tenementum sit fœdum ecclesiasticum vel laicum*; that, *utrùm aliquis fuerit seisitus de aliquo libero tenemento die quâ obiit, ut de fœdo, vel ut de vadio*; that, *utrùm aliquis sit infra ætatem vel plenam habuerit ætatem*; that, *utrùm aliquis obierit seisitus de aliquo libero tenemento, ut de fœdo, vel ut de wardâ*; that, *utrùm aliquis præsentaverit ultimam personam ad ecclesiam, occasione fœdi vel wardæ*. These he speaks of by name; and then adds, "and if any similar questions (as many might) arise in court during the presence of the parties, it was often awarded, as well by consent of parties as by the advice of the court, to decide the controversy by a recognition:" and then he mentions the recognition *de novâ disseisinâ*.<sup>1</sup>

Thus did Glanville consider, not only all those above specified, but all possible recognitions had by consent of parties upon the same footing, of the same nature, and attended with the same legal consequences: as they were all *recognitions*, so were they all *assizes*; those terms being, at that time, convertible. We have before observed, that a recognition taken by consent of parties was afterwards called a *jurata*, and that a distinction arose between an assize and a jury (*a*). In consequence of this, many of the issues which in Glanville's time were tried by an *assize*, were now tried by a *jury*; and of all those assizes enumerated by him, there remained at the time of which we are writing only that of *novel disseisin*, *ultimæ præsentationis*, *mortis antecessoris*, and this *assisa utrùm*. The first three of these survived, no doubt, because they were remedies by which property might be recovered, being attended with compulsory writs of execution and the like; and therefore, as they were continued for the same purposes for which they were framed, they retained their

(a) The author appears to have been misled by different words which meant the same thing in substance, only for different purposes. The recognition seems to be on the main question, but it was to be by twelve jurors, who were to be summoned to say whether the plaintiff was entitled; and as they gave their verdict on their own knowledge, they were said to recognize, and it was called a recognition; but Glanville calls them jurors. Thus, he says, that in a writ of mort d'ancestor twelve men are to be chosen to make the recognition, and the proceedings came to an assize; and when the assize is taken, he says, if the *jurors* decide for the demandant, judgment is given for him (lib. xiii., c. 7). So elsewhere: "If no exception be taken in court, on account of which the *assize* ought to cease, the *recognition* shall proceed, and the seisin shall, on the oaths of the *twelve jurors*, and according to their verdict, be adjudged" (c. 11). Thus it is clear that the assize was simply trial by jury.

<sup>1</sup> Glanv., lib. 13, c. 2. Vide vol. i., 442.



original appellation, with their original use; while the others, being to try issues which were of little importance, except when connected with some principal question of right, and which now might be tried by a jury, or by the assize in the cause turned into a jury, went out of practice as original assizes, if indeed they ever have been such. And it is to be wondered how the *assisa utrùm* escaped the same fate, having nothing in it like an original commencement of a suit, but seeming to be rather calculated for the trial of an incidental question, not of importance except as it was involved in some other.

In later times, those who wanted to account for these actions being denominated assizes, have usually said that they were called so, because the jurors were summoned in the first instance by the original writ, which did not happen in any other action. How far this might be, strictly speaking, a reason for the appellation, after what has here been said of the history of assizes and juries, the reader may form some judgment.

To return to the *assisa utrùm*. This assize is said by Bracton to have *multum possessionis et juris*, which is more than could be said of any other, as it determined both the possession and the right; for there could be no question raised about the right after this assize, though the person who had *more right* might, notwithstanding, contest his claim upon the *merum jus*. In this assize, recognition was to be made, whether the tenement in question was the lay fee of the tenant, or was held *in liberâ eleemosynâ*, belonging to some church. This assize, says Bracton, might be brought either by a layman or clerk; and so the practice had been established in the time of the famous justice *Pateshall*, though he afterwards himself altered his opinion, and held it would only lie in the person of a rector. But in the time of Bracton, they returned to the practice first established by *Pateshall*, and it was held good both for clergy and lay. This writ belonged only to rectors of parish churches, and not to vicars.

The writ in this assize was much the same as in Glanville's time, only it was returnable before the justices *ad primam assisam*. In this assize, the tenant, whether clerk or lay, might vouch to warranty, as in the assize of *mortis antecessoris*. This assize would not lie of land

given to cathedral and conventual churches, though given *in liberam puram, et perpetuam eleemosynam*; the reason was, because the gift was not to the church solely, but also to a person, to be held as a barony; as, *Deo et ecclesiæ tali, et priori, et monachis ibidem Deo servientibus, or episcopo tali, etc.*; and therefore such persons might have all those remedies which laymen might, as writs of novel disseisin, of entry, and of right; and consequently were not to avail themselves of a remedy devised merely for a parson claiming land in right of his church, and who could claim no otherwise: for in cases of parochial churches, gifts were considered not as made to the parson but to the church. This assize, like others, might be turned into a jury; and it may be noted here, that in all assizes, when the assize passed *in modum assisæ*, the entry on the roll was, *assisa venit recognitura, etc.*; when *in modum juratæ*, the entry was conformably *jurata venit recognitura, etc.*

It may be observed that, besides this assize, a parson might have many remedies to which laymen were entitled. He might have an assize of novel disseisin, and a writ of entry; an assize of mortuancesthor, from the nature of the parson's estate, could not be brought by him. If a writ of right was brought against a parson, he might, like another person, vouch to warranty, and then the suit would go on between the demandant and the warrantor to the duel, or the great assize. But if he had no warrantor, and had some one who could testify *de proprio visu et auditu*, then, says Bracton, he might put himself upon a jury to try, *utrum terra petita sit libera eleemosyna, etc., an laicum fœdum, etc.*, as if a layman had originally brought the *assisa utrum*; which is a very happy and pointed instance of the remark we made before concerning the issues, formerly triable by assizes, being devolved on juries. If he chose to defend himself by the duel or great assize for want of some witness *de proprio visu et auditu*, he might do it from the necessity of the case, provided he had license from the ordinary and the concurrence of his patron. If land fell to his church by escheat, there was a writ for the rector to recover it: *Præcipe quodd, etc., reddat tali rectori, etc., quam clamat esse jus ecclesiæ, et quæ, etc., reverti debet, tanquam eschæta.*

As this assize determined the right as well as the seisin, it was made a question by some, whether a con-

viction would lie against the jurors; and Bracton was clear, from some determinations in this reign, that it would, if the assize was taken *in modum assise*, and if the writ of conviction was prayed before a long interval had passed from the taking of the assize. A conviction had been denied where sixteen years had elapsed.<sup>1</sup>

As we have gone through all the assizes now in use, it follows that something should be said on the conviction or *attaint*, as it was called in latter Of conviction. times, for perjury, to which the recognitors were liable if they swore falsely. This is treated very shortly by Glanville, who only mentions the punishment; and from the passage where he speaks of it, one might be led to think it belonged only to the great assize.<sup>2</sup> We shall find that, on the contrary, though in Glanville's time it might lie in the great assize as well as others, yet now it lay in all others, but not in the great assize.

When, therefore, the jurors in any of the foregoing assizes had sworn falsely, and so committed perjury, they might be convicted of that perjury by the person who had lost by the assize (*a*). And that might be effected

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(a) The *Mirror* says, after mentioning the county court, "The other inferior courts are the courts of every lord of the fee, and in which they have cognizance of debts, covenants, and such small things which pass not forty shillings in value, and also of trespasses and *forfeitures of the fees* between the lord's plaintiffs and the tenant's defendants, *et e contra*" (c. 1, s. 15). And elsewhere it is said, "If rent-suit or other service be in arrear to the lord of the fee, the tenant is not distrainable by his movable goods; but it behooveth to summon the tenants, to save their deposits; and if they appeared at the summons, then by the award of the suitors their lands are to be seized into the lord's hands till they justify themselves. And if the lord have not a proper court nor suitors, or hath not power to do justice to his tenants, then the same may be done in the county or hundred or in the king's court, by a writ of customs and services and other remedial writs. And if the tenant hath not anything to acquit himself, the lord may seize his land" (c. 2, s. 10). "If any of the parties say that the jurors have made a false oath, or any jury, an action of the *attaint* lieth, which is to be tried by twenty-four jurors, so that every false witness be *attainted* by two jurors" (*Mirror*, c. 3, s. 33). Here will be observed the *principle* on which the *attaint* rested, viz., that the jurors were *witnesses* of their own knowledge, so that if their verdict was untrue, it must have been wilfully so; for if they did not know, they had no business on their oaths to say one way or the other. If they say on their oaths what they did *not know* to be true, was in effect the same as if they said what they knew *not* to be true. It is said in the *Mirror* as to the original trial, "The usage is that the affirmative party, in aid of the court, cause the nearest credible neighbor to appear as witness, so that there be twelve men at least of the jury (of ancient time ordained to be of the

<sup>1</sup> Bract., from 285 b, to 288.

<sup>2</sup> *Vide* vol. i., 401.

several ways: either by the oaths of twenty-four other jurors, or out of their own mouths by the examination of the judge, without recourse to the jury of twenty-four, or by their own free confession, in which they acknowledge their offence, and put themselves on the king's mercy; and in these different cases, the penalty was accordingly different.

If they were to be convicted by another jury, it was first to be seen how many jurors were in the assize (for they were not always the same number); each juror was to have at least two to convict him; and the jurors on the conviction were to be at least of as good condition, if not better, than those on the assize.

When it was in agitation to proceed to conviction in this manner it was first to be considered who was in fault, whether the judge or the jurors; for which purpose the record was in the first place to be inspected, for if the judge should not have diligently made that examination, which it was his duty to do, he himself might have negligently left occasion of perjury to the jurors, and thus both would be in fault; perhaps it might lie with one of them only. By the record it would also appear whether the assize was taken *in modum assisæ* or *in modum juratæ*. If in the former way, the jurors were to try whether the verdict was *true* or *false*; if it was true, then it remained in force; if false, the jurors were to be punished for their false swearing. According to Bracton, a distinction was made between a verdict that was *falsum*, and one which was called *fatuum*: as for instance, if they gave their verdict generally, and it was not true, then it was what they properly called *falsum*; but if they gave a reason together with their verdict, and it was not true, this was called *veredictum fatuum*, being only a wrong conclusion of the jurors, and so rather a false reasoning than a false swearing. The judge might sometimes go contrary to the verdict of the jurors when they spoke the truth and gave their reason for so doing. If, in such a case, he knowingly deviated therefrom, the fault lay with him.

If, upon view of the record, it appeared that the jurors, having declared themselves obscurely, had not

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assize), of which if two men are by false verdict of them and of the other jurors, or if by good examination of all the jurors to one assent it sufficeth" (*Ibid.*).

been properly and diligently examined by him, or had answered his interrogatories not fully or doubtfully, or seemed to have been misled by some mistake, or to have spoken the truth only in part, in such cases, the remedy was by *certificate* and not by conviction; the certificate being a proceeding whose object was to render certain and true that which was before dubious, erroneous, and uncertain (a): of this we shall say more hereafter.

In order to the conviction, as we before said, it must first be seen, whether the assize was taken in *modum assisæ* or in *modum juratæ*. When the complainant or demandant propounded his *intentio* and maintained all the articles of the writ, and the tenant excepted to both, by denying them in part or in the whole, the complainant was then to prove them by the assize: and as this was in *modum assisæ*, a conviction would lie. But where the exception was of such a kind that, admitting both the matter of the writ and the *intentio*, yet it destroyed the action as a covenant or the like, then the assize was taken, as has been often before mentioned, in *modum juratæ*, and the conviction would not lie. Yet, if the assize was taken in the absence of the tenant, and they found such matter as would have been good subject of exception to the action, as a covenant, for instance, or the like; then the assize being taken in *modum assisæ*, a conviction would lie.<sup>1</sup>

A conviction, as we before said, lay in all assizes except the great assize; and the reason given by Bracton why it did not lie there is, because when the tenant had the choice between the duel and the assize, and he had voluntarily betaken himself to the latter, he should not be allowed to reject their determination any more than when a person had chosen to put himself on a jury;<sup>2</sup> and therefore a conviction which was with a view to over-

(a) Here again it is observable how closely the *Mirror* follows Bracton, from whom all this is taken. "If jurors have obscurely, or doubtfully, or not sufficiently given their verdict in any action or exception, or any of the parties be grieved thereby, there is a remedy by a commission of certificate, to make the jurors come again; and the parties who are the plaintiffs ought to have under the seal of the judge, the proceedings of the plea before it, and to show the defect and the offence of the juror; in which case, if the judges by examination find it doubtful, the doubt is to be reduced to certainty, and the obscurity to clearness, and the error to truth, and so the first judgment is to be redressed" (c. iv., s. 27).

<sup>1</sup> Bract., 288 b, 289, 290.

<sup>2</sup> *Vide* vol. i., 395.

throw and question such determination, was denied in both cases. However, there was an exception in favor of the king, for when a jury had found anything against the king, Bracton says, that there might, in some cases, be a conviction. There was no conviction for damages, but the remedy in case of excessive damages was by *certificate*. The same persons who brought an assize, or against whom it was brought, might have a conviction; and it was, in general, to be heard before the judge who tried the assize, he being best able to judge of the truth thereof.<sup>1</sup> The authority to take an assize was thought *eo nomine* to carry with it that of taking convictions and certificates, without which an assize might sometimes not be completely taken; therefore it was, that a conviction was to be *statim et recenter* after the caption of the assize; and it could not be had at a distance of time but by the special command of the king.<sup>2</sup>

The writ of conviction was to the following effect: *Si A. fecerit, etc., tunc summoneas, etc., 24 legales milites de vicineto de villâ, etc., quòd sint coram justitiariis nostris ad primam assisam, etc., recognoscere si talis, etc., disseisivit, etc.,* as in the writ of assize; *unde A. queritur, quòd juratores assisæ novæ disseisinæ quæ inde summonita fuit et capta inter eos coram justitiariis nostris ultimo itinerantibus in comitatu, etc., falsum fecerunt sacramentum. Et interim diligenter inquiras, qui fuerint juratores illius assisæ, et eos habeas ad præf. assisam coram præf., etc. Et summoneas B. quòd sit, etc., auditurus illam recognitionem, etc.*<sup>3</sup> If nothing could be objected against this inquiry when the jury appeared, they were sworn, not as an assize, but as other juries:—"Hear this, ye justices, that I will speak of that which you require of me, on the part of our lord the king," etc. Then the judge proceeded to charge the jurors as in other cases. The entry upon the roll was thus: *Jurata viginti quatuor ad convincendum 12 venit recognitura, si A. injustè et sine judicio, etc.,* according to the form of the writ: and then the *narratio* followed: *Et unde talis queritur, quòd juratores talis assisæ captæ coram justitiariis, etc., falsum inde fecerunt sacramentum, eò quòd dixerunt quòd prædictus talis disseisivit talem injustè, etc.,* and so on through the *narratio* and *exception*, if any.<sup>4</sup> Upon this writ of conviction it may be remarked, as a reason

<sup>1</sup> Bract., 290 b.<sup>2</sup> Ibid., 291.<sup>3</sup> Ibid.<sup>4</sup> Ibid., 292.

why it should not lie, when the assize was taken *in modum jurata*, that the form of the original writ in the assize was so inserted as to confine the inquiry to the articles of that writ;<sup>1</sup> whereas the point tried by the assize *in modum juratae* was, generally, something collateral to the writ which arose upon the pleading.

As these twenty-four could not be convicted if they spoke falsely, and as the consequences of a conviction would be very penal to the twelve, great care was taken to examine the jurors diligently as to all the circumstances upon which they meant to proceed. If there was a difference of opinion amongst them, they might be afforded like the assize. If they were still doubtful, or declared plainly that they knew nothing of the matter, things were left to remain as they were. If they confirmed what the twelve had done, the judgment was entered thus: *Consideratum est quòd 12 juratores benè juraverunt, et quòd tenens remaneat in seisinâ, et querens custodiat*, to be redeemed by some heavy pecuniary penalty. If they found against them, the entry was, *Consideratum est, quòd prædicti 12 juratores malè juraverint, et quòd querens recuperet seisinam suam, et ille tenens in misericordiâ, et juratores* (if they were present) *custodiantur*, if not *capiantur*. If the twelve had not been unanimous in their verdict, the twenty-four might convict those who were on the wrong side, and acquit the others.<sup>2</sup> After the verdict of the twenty-four, there issued writs of execution either to confirm the former seisin or to alter it.<sup>3</sup>

The punishment of the convicted jurors, though in substance the same, is more particularly stated by Bracton than by Glanville.<sup>4</sup> They were to be thrown into prison; their lands and goods were to be taken into the king's hands, till they were ransomed at the king's pleasure; they were to be branded with perpetual infamy; to lose the *legem terræ*, so as never more to be received as jurors (being, as they then called it, no longer *othesworth*) nor witnesses. A difference was made between the offence of jurors; for those who swore *salvo visu*, not having made it; those who were added to the assize at the time of taking it, who could not possibly have made it; those who, soon after the taking of the assize, had signified a

<sup>1</sup> Bract., 291 b.    <sup>2</sup> Ibid., 292 b.    <sup>3</sup> Ibid., 262 b, 293.    <sup>4</sup> Vide vol. i., 401.

wish to amend what they had done, and put themselves on the king's mercy;<sup>1</sup> all such were not to be branded with infamy, though they were to suffer the other part of the judgment.

This was the manner of proceeding if there was no exception offered to the conviction. The exceptions that might be offered were many. One was, if the person who recovered in the assize had not had seisin according to the verdict; another was, if the person serving the conviction had made a disseisin of the identical land in question. It seems that a conviction was often prosecuted not out of any hopes of convicting the twelve and recovering seisin, but merely to extinguish, or at least defer payment of, the *misericordia* due in the assize.<sup>2</sup>

Having said this much of *convictions*, it remains to show what was the nature of a *certificate*, which was the other method of reconsidering the decision of the jurors in assize, and which was sometimes an introduction to the former. The writ to summon jurors *ad certificandum* was of the following import: *Præcipimus tibi, quodd habebas coram justitiariis, etc., corpora A. B. C., etc., recognitorum novæ disseisinæ summonitæ, et captæ coram, etc., ad CERTIFICANDUM præfatos justitiarios nostros, etc., de sacramento quodd inde fecerunt. Et interim prædictum tenementum in manum nostrum cape, etc. Præcipimus etiam quodd habebas, etc., corpus talis ad audiendum inde considerationem curiæ, etc.* A certificate was sometimes heard in order the better to understand the record in assize, and after that it might be thought proper to resort to a conviction. If the twenty-four were doubtful or obscure in delivering their verdict, there might also, after all, be a certificate of their record.<sup>3</sup> A conviction might be brought by the heir, if the ancestor died after the caption of the assize.<sup>4</sup>

We have before taken notice of the lenity shown to such jurors as wished to amend the false verdict they had once given. This had the effect of taking off some of the consequence of their perjury. To this it may be added, that the jurors, of right, might change their verdict before judgment was given; but afterwards, the only remedy was to proceed against them in a conviction.<sup>5</sup>

As we have now done with assizes, and are proceeding

<sup>1</sup> Bract., 292 b.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid., 293 b, 294.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid., 296.



to such actions as were triable by jury and otherwise, it may be proper, before we enter upon this part of our subject, to say a few words on the different trials now in use: which, though apparently very similar, were so essentially distinguished as to make it necessary to attend to each of them with accuracy.

It must be observed that there were *assizes*, of which enough has already been said, *juries*; *inquisitions*, or *inquests*; and *purgations*; as when a crime was imputed to any one, a purgation amounted to a proof of his innocence. Besides these, says Bracton, there was a defence or denial opposed to a presumption raised, which depended neither on a jury, nor an inquisition, nor a purgation, but it was when a person averred something, *et inde producit sectam*; upon which there followed a defence *contra sectam* or a *quasi*-proof opposed to the presumption raised by the *secta*. Such defence against a *secta* was called a defence *per legem*, and consisted sometimes of a greater number of persons and sometimes of less, in different cases. We have before seen the regulation which had been made by *Magna Charta* upon this head.<sup>1</sup> What was the nature of this *secta* and of this defence or denial, with the instances in which they were both recurred to, will be seen more particularly in the sequel.<sup>2</sup> For the present, let it suffice to say, that in all cases of obligations, contracts, and stipulations, arising from the voluntary consent and engagements of men, as in covenants, promises, gifts, sales, and the like, where a *secta* was produced, which, upon examination, induced a presumption only, he against whom the complaint was made, might defend himself *per legem*; that is, he might produce double the number of persons which had been in the *secta* to swear for him, for when they exceeded the *secta* in number, they induced a stronger presumption, and the stronger presumption always overbalanced the less. But if the complainant had a proof (for it must be observed, that the *secta* was only a presumption, not a proof), as instruments and sealed charters, there could be no defence *per legem* opposed to such proofs. If, therefore, the instrument was denied, the credit of it was to be proved *per patriam*, *et per testes*; it being a common issue for a person to put himself *super patriam*, *et testes in cartâ nominatos*.<sup>3</sup> Again a

<sup>1</sup> *Vide ante*, 39.<sup>2</sup> Bract., 290 b.<sup>3</sup> *Ibid.*, 315 b.

person was not allowed this defence *per legem* in cases of evident and notorious trespass.

We shall now begin to speak of such actions as were triable in one or other of these ways. The action of  
Dower *unde*  
*nihil.*
dower *unde nihil habet* and the writ *de recto* of dower, were the two remedies still in use to recover dower, and seem to be considered by Bracton exactly in the same light in which they are placed by Glanville. The method of conducting them is more minutely described by Bracton, who also makes observations concerning them, which are well worthy of notice.

The writ *unde nihil* was said to be brought in the king's court originally, and there only, because, should a question arise, whether the demandant was lawfully married, no one could write to the bishop to try the marriage but the king or his justices. The writ *unde nihil* was at this time made returnable, sometimes *coram justitiariis nostris apud Westmonasterium*; sometimes *coram justitiariis nostris ad primam assisam, cum in partes illas venerint*.<sup>1</sup> If the party summoned did not come at the appointed day, nor essoin himself, the land was taken into the king's hands, as in defaults in a writ of right; and if he essoined himself at the first day, and another being appointed, he made default, then also his land was taken, so that, in both cases, whether the default was before appearance or after, the woman recovered her dower by default, either by the *magnum cape* or *parvum cape*.<sup>2</sup>

When the parties appeared in court, the widow was to propound her *intentio* in person or by attorney, to this effect: *Hoc vobis ostendit B. quæ fuit uxor C., etc.*, reciting her title to dower, in pursuance of the words of the writ, concluding it thus: *Et si hoc cognoscere voluerit, hoc gratum erit ei; et si non, habet sufficientem disrationationem*; or, what was the same, and indeed the more common form, *et inde producit sectam sufficientem*. When the demandant had thus exhibited her *intentio*, the tenant might demand a view, by saying, *Peto visum*; and after the essoins and delays attending that, he might vouch to warranty, or answer in person, as he pleased.<sup>3</sup>

<sup>1</sup> Bract., 296 b.

<sup>2</sup> Ibid. The distinction between the *magnum* and *parvum cape* will be explained when we come to speak more particularly of process.

<sup>3</sup> Ibid., 297.

If the tenant had no exception to the writ, then he might, in the next place, call upon the demandant to produce her warrantor, as was the practice in Glanville's time; it being a rule that no one should answer a woman concerning her dower, unless she brought her warrantor to show what right he had to the other two parts; and again, that no woman should answer without her warrantor. And therefore it should seem, says Bracton, that as the son of a felon could have no right in the two parts, the widow of such felon could not make out her claim to dower in the other third; nor could she come upon the chief lord, who held it as an escheat *pro defectu hæredis*; which was not the case where he took the escheat on account of the last possessor being a bastard, and so not having any heirs, for then he came in, as to the purpose of dower, *loco hæredis*; and the widow could claim her dower against him. The same might be said of an assignee of the fee, who being in *loco hæredis*, dower might be claimed against him.<sup>1</sup>

After this the tenant might vouch *his* warrantor; and if he did so, and the warrantor did not appear to the writ of *sum. ad warrant.* nor essoin himself, so much of his land was taken as was equivalent to the third part by a *cape*; and if he did appear after this distress (for it was no more), the widow recovered her seisin of that, and he had his remedy against the warrantor, whom he vouched.<sup>2</sup>

If no warrantor was vouched, and the tenant meant to answer to the action himself, he might advance, by way of exception to the action, such matter as would entirely defeat the claim of dower. One great exception to this action was, that the demandant and deceased were not *legitimo matrimonio copulata*, or *ne unque accouples in loyal matrimonie*, as it was afterwards called. In this case, a writ issued to the bishop, commanding him to try such question, as a matter properly belonging to his cognizance. Upon this, the bishop summoned the tenant to appear, and then proceeded to hear the witnesses produced by the widow and him; and so making an inquisition in a summary way, he reported whether the marriage was lawful or not. When it appeared to the king or his justices, by the bishop's letters, that the marriage was good, then there

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<sup>1</sup> Bract., 297 b.<sup>2</sup> Ibid., 299 b, 300.

issued, at the instance of the demandant, a resummons to the tenant.<sup>1</sup> If he made default, his land was taken by a *parvum cape*; to which, if he made no appearance, seisin of dower was adjudged to the demandant.

If the tenant admitted that the demandant was espoused, but pleaded that she was not endowed; or that she was espoused and endowed; but not *ad ostium ecclesiæ*; such issues were to be tried in the king's court, and not in *foro ecclesiastico*; for it would have been as improper to transmit these to the ecclesiastical judge to be tried, as the special issue, whether a person born before marriage was legitimate. In this case, therefore, a writ of inquiry went to the sheriff to make inquisition of the fact *in pleno comitatu*.<sup>2</sup> for though the marriage was, in such case, good, as far as concerned the legitimacy of the issue, it was not so as to give title to dower.<sup>3</sup>

Suppose all the above circumstances were admitted, and the tenant said that the dower was given in a different manner than stated in the *intentio* of the demandant; as that it was not given in any particular land by name, but only the third part generally; how was this to be proved? In the first place, it became the widow to prove her *intentio*, and what she had there averred, *per audientes et videntes*, who were present at the espousals, and who were ready to confirm by oath what she said. If these were examined, and they agreed in what they said, this proof was abided by, unless the tenant had some stronger evidence to prove the contrary. Suppose the widow had no proof, nor sufficient *secta*, nor even an instrument to support what she had declared; then judgment was to be for the tenant, though he had neither proof nor presumption for him, because he was already in possession; yet if the widow had a sufficient *secta*, and the tenant only his own voice, he was not to be heard, though he was ready to put himself *super patriam*, but the widow immediately recovered by force of the *secta*.

Again, if the witnesses (that is, the *secta*) were produced on both sides, and those on one side declared their ignorance of the matter, while the others maintained the point for which they were produced; judgment was given for that side, as the one where the truth of the matter lay.

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<sup>1</sup> Bract., 302, 303.

<sup>2</sup> Ibid., 303 b.

<sup>3</sup> Ibid., 304.

It was indispensably necessary, that the widow should produce a *secta*, or her demand would be totally void, and if the witnesses produced proved nothing, or acknowledged that they were not present at the espousals, or knew nothing of the dower or endowment, then the claim was lost for want of proof, and judgment was for the tenant *quodd quietus recedat*.

If neither side had any proof, nor could raise a presumption by a *secta*, and both, in the words of Bracton, *de veritate ponunt se SUPER PATRIAM, pro defectu sectæ, vel alterius probationis, quam ad manum non habuerint*; then there issued a writ of *venire facias* to the sheriff in this form:<sup>1</sup> *tam ex ipsis, quàm ex aliis de proximo vicineto, etc., venire facias coram justitiariis, etc., duodecim liberos, etc., ad recognoscendum, etc., si prædictus A. die quo ipsam B. desponsavit, dotavit eam nominatim de tali manerio, etc., vel si dotavi eam de tertiâ parte omnium terrarum, etc., ut idem D. dicit, quia tam prædicti B. quàm prædictus D. posuerunt se, etc.*<sup>2</sup> It may be here observed, that the issue, whether endowed *ad ostium ecclesiæ*, was tried on a writ of inquiry before the sheriff *in pleno comitatu*; but the issue, whether special or general endowment, was to be tried before the justices at Westminster; as was also the issue, whether endowed *ex assensu patris*, or not.<sup>3</sup> Again, the issues, whether the husband was so seized as to be able to endow,<sup>4</sup> and whether the widow had received any part of her dower,<sup>5</sup> were tried on a writ of inquiry before the sheriff. The reason of these distinctions is not easily discovered; and perhaps either of such writs were had at the election of the parties. The election of the parties seems to have directed not only in these cases, but also in the return of original writs, which, we have seen, were sometimes *coram justitiariis* at Westminster, and sometimes *ad primam assisam*, without any apparent reason for such a variety. They were sometimes made in the alternative, and were returnable at Westminster, *NISI justitii PRIUS venerint ad assisam, etc.*

In consequence of the statute of Merton,<sup>6</sup> widows were to recover damages; and therefore, when they were to be put into possession, the writ of seisin had one of the following clauses inserted therein. After *seisinam habere facias*, they added, *et similiter ei sine dilacione habere facias*

<sup>1</sup> Bract., 304.<sup>2</sup> Ibid., 305 b.<sup>3</sup> Ibid., 312.<sup>4</sup> Ibid.<sup>5</sup> Ibid., 309.<sup>6</sup> Ch. 1. Vide ante, 57.

*tot marcas quæ ei in eâdem curiâ nostrâ adjudicatæ sunt pro damnis suis, quæ habuit pro injustâ detentione, quam prædictus ei fecit de prædictâ terrâ, et dote suâ; or in this way, et de terris et catallis prædicti B. fieri facias tot denarios, et illos sine dilatione haberi facias, etc.*

Thus far of the writ of dower *unde nihil, etc.*, commonly called *the writ of dower*. If a person did not recover by this writ all she was entitled to for dower, recourse was then to be had to the writ of right of dower; which was a writ *close*, as they called it, because directed to the warrantor of the widow where the plea was to be heard; where it remained till that court was proved *de recto defecisse*; when it might be removed into the county court, and so to the superior court, as other writs of right.

The *intentio* upon this writ was different in the two cases, of the widow having never been in seisin of the land in question, and of having been disseized by the tenant. The conclusion in the former case was *et unde idem, etc., fuit seisitus, etc., ita quod me inde dotare potuit. Et si hoc vellet cognoscere, etc.*, as before in the writ *unde nihil. Et si noluerit, habeo sufficientem sectam*. In the latter the conclusion was, *talis me injustè et sine judicio disseisivit, et quod ita fui inde dotata, et seisita habeo sufficientem disrationationem, videlicet, talem sectam, et talem*. Thus this differed from the common writ of right, which concluded by offering to deraign the matter *per corpus talis hominis*. Indeed, it widely differed from that writ in both the above instances in which it was applied; a writ of right of dower was for the recovery of a life estate; and the latter form of it was grounded upon a disseisin in the very words of the writ of novel disseisin: and accordingly, in this action there was neither the great assize nor the duel, nor, consequently, the essoin *de malo lecti*; all which were only in the proper writ of right.

When the *intentio* was thus stated, and the tenant did not choose to call a warrantor, he might except to the action in various ways, and conclude his exception by *et inde producit sectam*, if he had any; and, if there was occasion, by *ponit se super patriam*; in which last case the truth would be inquired of by the country. When recourse was thus had to the country, in a plea depending in the county court, by the tenant putting himself on the

inquest, and the demandant so likewise, Bracton says, some might doubt whether that court had power to proceed to take the inquest, without some special authority; but he thinks the sheriff had that and every other authority by force of the words in the original writ, *nisi, etc., hoc fecerit, tunc vicecomes hoc faciat, etc.*, and as in other writs of right he might proceed to take the duel, and in writs of *justicies* to try by jury, so he might take the inquest in this writ.<sup>1</sup> The reason of the above doubt does not seem easy to be accounted for.

In Glanville there is no mention of admeasurement of dower, but where the land all lay in one county. It had now become the practice, where the land lay in several counties, for the admeasurement to proceed in the king's court; and for all the lands to be extended and valued, as well the two-thirds as the third claimed in dower, and for such extent and valuation to be transmitted to the justices. Where the land lay only in one county, the old writ was directed to the sheriff; upon which there was the process of *cape*, in case of default; and the complainant stated his *intentio*, with an *inde productit sectam*; to which there were exceptions, and the matter was at length tried as in other actions.<sup>2</sup>

As a woman had not, what they called, the *proprietas*, but only the use and enjoyment of the land for her life, she was not to commit waste, destruction, or exile upon the freehold; and therefore, in taking such reasonable estover as was allowed her in the woods, for the purposes of building, firing, and enclosure, she was to be careful not to exceed such liberty: and if she did not listen to the remonstrance of the heir, or person who had right, there might issue a writ of *quodd non permittat* to the sheriff; being a sort of injunction, or prohibition, not to permit the widow *quodd faciat vastam de terris quas tenet in dote, etc., ad exhæredationem ipsius, etc.* And if she did not obey the injunction communicated to her by the sheriff, she was attached by a writ: *Pone per vadium et salvos plegios, etc., quodd sit coram nobis vel justitiariis nostris, etc., ostensura quare fecit vastum, etc., contra prohibitionem nostram, etc.* And if she did not appear at the day, the regular process of attachment would issue, with a

<sup>1</sup> Bract., 313 b.

<sup>2</sup> Ibid., 314, 315.

permission, if she pleased, to have one *essoïn de malo veniendi* after the first attachment; after which, and the appearance of both parties, the complainant stated his *intentio*, the same as in other actions. *Talis queritur, ut amicus talis, quodd cum talis mulier teneat in villâ, etc., tantam terram nomine dotis, tale fecit vastum, et talem destructionem, etc., boscum et servos vendidit, gardinum extirpavit, etc., ad exhæredationem talis hæredis ad valentiam tanti, et inde producit sectam, etc.* This was the nature of the *intentio*. To this the widow might answer as follows: *Et talis mulier venit, et defendit vastum, venditionem, et exilium contra talem, et sectam suam: et quodd nihil inde vendidit, nec aliquid tale fecit ad exhæredationem talis hæredis, etc.* She might acknowledge, *quodd domus vetustate corruerit, etc.*, and *si de bosco cepit aliquid, non cepit ibi nisi rationabile estoverium, etc.*, and then conclude, *et quodd nihil amplius cepit, nec alio modo ponit se super patriam:* for she could not defend herself *per legem*, says Bracton, because when an injury was done to any corporeal thing, which was manifest to the view of everybody, a person was not permitted to deny it in that way, lest the oath of his *secta* might go to prove the contrary of that which was evident to everybody's senses; and therefore he recommends, that in this action there should always be a regular view; and then the damage also might be ascertained with some exactness.<sup>1</sup>

If a woman was convicted, by verdict, of making waste and destruction in woods, the penalty to be inflicted on her was, that she should in future be so restrained as not to be permitted to take even her reasonable estover but by the view of the foresters of the heir: and in some cases, the court would appoint a forester; for which purpose a writ had been framed, and is to be seen in Bracton.<sup>2</sup>

Waste might be committed, not only by a tenant in dower, but by a tenant for life, and by a guardian. If a tenant for life exceeded the measure prescribed to a reasonable estover, he went beyond what he was entitled to; and so far encroached upon the *proprietas*; and was, therefore, guilty of waste, unless the waste was too small to be worth an inquisition. Of what magnitude it ought to be, to become an object of judicial inquiry, depended, says Bracton, upon the custom of particular places.<sup>3</sup> A

<sup>1</sup> Bract., 315 b, 316.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid., 316 b.



guardian committing waste was to lose the custody of the land,<sup>1</sup> to make amends in damages, and be *in misericordia regis*; which was different from the penalty on a tenant in dower. In case of waste by a guardian, they proceeded as before stated of waste committed by a tenant in dower; by a writ of *quodd non permittat*; and after that by attachment.<sup>2</sup>

Of these terms, *waste*, *destruction*, and *exile*, the first two signified the same thing; but *exilium* meant something of a more enormous nature; as spoiling the capital mesuage; prostrating or selling houses; prostrating and extirpating trees in an orchard, or avenue, or about any house: all these were considered, says Bracton, *ad maximam deformitatem*; and as they either drove the inhabitants away, or had a tendency so to do, they were called *exilium*.<sup>3</sup>

If the heir aliened the two-thirds of the land, and attorned the service of the dowress; and if he afterwards, on the death of the tenant in dower, intruded himself, or if any stranger did so, the vendee might have a writ of entry, grounded upon such intrusion.<sup>4</sup>

We shall now treat more fully of writs of entry, which have been so often alluded to in the foregoing pages. As questions of possession were determined by assizes and recognitions, questions *de proprietate* were decided, says Bracton, in writs of entry by a jury, upon the testimony and proof of those who could prove the case *de visu suo proprio et auditu*. This was, where any one claimed his own proper seisin, or that of his ancestor, which seisin he had demised to some one for a term of years, or for life, and which, of course, after that term, should revert to him; in which case, he could not have an assize of novel disseisin to recover it, because he had not suffered a disseisin; nor an assize of mortdauncestor, because, if the term had been for life, the ancestor could not be said to have died seized in his demesne as of fee, while another had the freehold; though indeed he might, if the term had only been for years.

And this action lay not only against the person himself who had the term, but against all those who had an entry within the *degrees* and the *time* limited to this ac-

<sup>1</sup> *Vide ante*, 21.<sup>2</sup> Bract., 317.<sup>3</sup> *Ibid.*, 316 b.<sup>4</sup> *Ibid.*, 317 b.

tion. This action was allowed within the third *degree* of kindred, and within such *time* as could be testified *de proprio visu et auditu*. It held not only in the above case, but where a person had his entry *per alium*, who was seized in right of some other, and so aliened; as where a canon aliened without assent of the chapter, a wife without assent of her husband, a husband without assent of his wife, and the like; it held also against those who gained their entry through the medium of a guardian, or bailiff only, who had no right to alien.

The most general form of a writ of entry was that which supposed the person against whom it was brought, to have holden the land *ad terminum qui præterit*; upon which writ there might be a *narratio*, containing such special matter as constituted the merits of the case. The following was the form of this writ: *Præcipe A. quòd justè et sine dilatione reddat B. tantum terræ cum pertinentiis in villâ, etc., quòd idem B. ei dimisit AD TERMINUM QUI PRÆTERIIT, ut dicit; et nisi fecerit, et B. fecerit te securum de clamore suo prosequendo, tunc sum. per bon. sum. præf. A. quòd sit coram justitiariis nostris ad primam assisam, cum in partes illas venerit, ostensurus quare non fecerit, etc.*<sup>1</sup>

The process upon this writ was the same as on a writ of right; except that the tenant who might have the *essoin de malo veniendi*, could not have that *de malo lecti*, unless the writ of entry was turned into a writ of right by the *narratio*, or counting upon it, *propter longissimum ingressum*, on account of such a length of entry as could not be proved *visu proprio et auditu*, but only by that of some one else. If it was reasonable that when this writ of entry became a writ of right, it should have all the consequences attending that writ, whose nature it had assumed by the manner of counting; so likewise, on the other hand, when a writ of right was turned into a writ of entry, as happened not unfrequently, it entirely ceased to be a writ of right in all respects, and there was no longer therein the *essoin de malo lecti*.<sup>2</sup>

Before more is said concerning the change of a writ of entry into a writ of right, and of a writ of right into a writ of entry, the reader must recollect that the writ of entry has already been spoken of as an invention since

<sup>1</sup> Bract., 317 b, 318.

<sup>2</sup> Ibid., 318.

the time of Glanville; and was contrived, no doubt, to avoid the necessity of recurring to the duel and great assize, whose determination could never afterwards be reconsidered. Thus this new writ was framed in the nature of that for which it was to be an occasional substitute; and so great an affinity was still discernible between them, that we see, in these and many other instances, they were convertible, that is, either of them might become the other to all intents and purposes. How that was effected, will be rendered clearer by a few instances.

When it was attempted to convert a writ of right into a writ of entry by the counting, and the demandant said that he was ready to prove it by a jury; yet it was in the election of the tenant whether he would put himself upon the jury to try the entry, because he had three remedies; for he might either defend himself by the duel, or put himself upon the great assize to try the right, or upon a jury to try the entry. Thus, as it was at the option of the tenant to choose which of these he pleased, the writ of right was not changed into a writ of entry (notwithstanding the counting), till the tenant had chosen to put himself on a jury to try the entry; as, for instance, if a writ of right was brought containing the words necessary to include the *jus merum*; and then there was added this clause: *Et in quam non habet INGRESSUM nisi per talem antecessorem suum, qui terram illam ei dimisit ad certum terminum, etc.*, though these were words perfectly proper to bring in question the entry, and though it was within the time to prove it *proprio visu et auditu*; yet a writ of right would not, by so doing, become a writ of entry, but would continue as it was, unless the tenant voluntarily put himself upon a jury to try the entry.<sup>1</sup>

A writ of entry was sometimes changed into a writ of right, not by choice, as in the above-mentioned change, but through necessity; either *propter longissimum INGRESSUM*, the great distance of time at which the entry was alleged, or *propter donum et feoffamentum*. That was called *longissimus ingressus*, which could not be proved *proprio visu et auditu*, but was obliged to be proved by tradition; as *de visu et auditu patris*, who enjoined his son to give testimony thereof: in which case, out of necessity,

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<sup>1</sup> Bract., 318 b.

from the want of proof, the tenant was forced to put himself upon the great assize, or defend himself by duel. Thus, suppose an entry was laid so far back as the time of Henry II. or later, yet so as not to be within the limitation of a writ of mortdauncestor; as suppose thus: *Et unde A. non habet ingressum nisi per B. qui non nisi custodiam inde habuit, etc.*, and then was added, *et unde prædictus, etc., fuit seisitu in dominico suo, ut de feodo, et jure tempore talis regis capiendo inde expletia, etc., et de tali descendit jus, etc.*, as in a writ of right; in this case, the tenant was obliged to put himself upon the great assize, or defend himself by duel, for want of other proof: but, would the distance of time allow it, he might, if he chose, have put himself upon a jury to try the entry.<sup>1</sup>

Thus far for the change *propter longissimum ingressum*, or the antiquity of the entry. The other, *propter domum et feoffamentum*, was, where a feoffment was opposed to the entry, which might be stated in this manner by the tenant: *Defendit talem ingressum, et dicit, quodd habuit ingressum per antecessorem illum (de cujus seisinâ idem Petrus petiit terram illam) qui de terrâ illâ feoffavit eum tenendum pro homagio et servitio suo, et quodd tale fuit jus suum per feoffamentum et non per talem ingressum ponit se in magnam assisam*; upon which the assize proceeded to try the issue, whether the tenant had more right to hold the land for the homage and service by reason of the feoffment, or the demandant to hold it in demesne.<sup>2</sup>

To return from this digression upon the reciprocal changes of writs of entry and writs of right; and to go on with the manner of proceeding in a writ of entry. The process, as was before said, was the same as in the writ of right, and therefore need not be particularly noticed in this place. When both parties appeared, the demandant was to begin by stating his *intentio*. If he was only a tenant for life, he was to claim the land, *ut jus meum possessorium*; if in fee, *ut hæreditatem*; and then go on, *in quam talis non habet ingressum nisi per talem, etc.* To this the tenant might answer by denying the right of the demandant *per talem*, and say, that he had not an entry *per talem* mentioned in the writ, but *per alium talem*; and of that he might put himself upon an inquest. It

<sup>1</sup> Bract., 318 b.

<sup>2</sup> Ibid., 319.

appears from Bracton that this inquest might be taken before the sheriff, and the *custodes placitorum coronæ in pleno comitatu*; and then there issued a writ of inquiry to the sheriff; or it might be *coram nobis*, or *coram justitiariis nostris apud Westmonasterium*: and in that case, there was a writ of *venire facias*, as it is since called.<sup>1</sup> Whether this matter was to be tried before the sheriff, or before the justices, depended probably upon the return of the original writ, which we have seen had sometimes the one, and sometimes the other return; or it might perhaps be at the option of the party to choose the sheriff; or the justices might reserve only such questions as were thought to be of great difficulty, to be tried at the bar of the court: but that in a *commune placitum* the jurors should be summoned to try such an issue *coram nobis*, seems very particular, and not easily to be accounted for.<sup>2</sup> When a *præcipe* was returnable before the justices assigned, the issue was, most probably, tried before them also; and probably it rested merely on the option of the demandant whether the original writ should have the one or the other return. It was not unusual to cause a jury which had been summoned before the justices assigned, to be removed into the superior court at Westminster; for which purpose there issued a special *venire facias*; and if the jurors made default, a *habeas corpora recognitorum*, which had sometimes a clause directing the sheriff to fill up what vacancies had happened among the jury by death or otherwise.<sup>3</sup>

We have above supposed that the issue went to a jury to be tried; but before this, it was necessary that both parties should take such steps to prove, or raise a presumption in support of their allegations, as was required in other actions determinable by jury. The *intentio* was not in this, any more than in other actions, to be taken on the *simplex loquela*,<sup>4</sup> of the demandant: he must produce proof, if he could; or, if he could not, he must raise a presumption by a *secta*, which was open for the other side to defend *per legem*. If the demandant had neither, the tenant had no need to answer the action at all, and the writ was lost; unless, says Bracton, as some thought, he might, and ought *de gratiâ justitiorum*, to be assisted

<sup>1</sup> Bract., 319 a. b.

<sup>2</sup> *Vide ante*, 30. Magna Charta.

<sup>3</sup> Bract., 325 b., 326.

<sup>4</sup> *Vide ante*, 39.

by a jury of the country (a). But this was to be only upon some good cause being shown; either that the instruments on which he relied for proof of the matter were lost; or that he had them not at hand, or could not get them without difficulty, to make use of on that occasion. In such cases, it seems, the court would direct the matter to be tried by a jury; and another day would accordingly be given to the parties.<sup>1</sup>

If the parties did not go to issue in the above way, it was because the tenant chose to except to the action. The exceptions he might make were many: he might say, that some one else had more right than the demandant; that another made the demise, and not the person named in the writ; that the term was not expired; or, if it was expired as far as limited by one instrument, that it had been enlarged by another, which he then exhibited; that the time exceeded the limitation in a writ of mortuancestor, and therefore the proof would be defective. These and numberless other exceptions might be taken.<sup>2</sup> The tenant might vouch to warranty the person *per quem* he had his entry, and that the warrantor might vouch another; and so on, to the fourth degree, but not beyond.

The writ of entry lay properly only against a freeholder; that is, one who had an estate for life, or in fee, or in fee-farm, and such only was considered as properly tenant. However, in truth, says Bracton, if this writ was brought against a farmer, it would not fail, for he might call his warrantor; and if he defended him, the farmer would retain his usufruct: if not, he might have his resort to the warrantor, as far as his usufructuary interest went; and the warrantor over against his warrantor, as far as

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(a) "If 'suitors' of the manor or the hundred were tenants of one or other of the parties, it was recognized as a good cause for the removal of the case into the king's court, which could award the *venue* to be not of the county generally, but of *some other* vill or hundred, so as to exclude any from the particular place in question; as it was, if the case came into the county court, the case might come before some of the suitors of that very hundred or manor whom it was desired to exclude" (*Year-Book*, 3 Henry VI., 39). So, if the case interested a corporation, or some person who was lord of the hundred, or the hundred itself, the case would be removed into the king's court, and the jury be directed to come from another hundred, not from the county at large (*Year-Book*, 15 Edward IV., c. 3; 22 Edward IV., 3; 31 *Assize*, 19. Trial *per frais*, 109).

<sup>1</sup> Bract., 820.

<sup>2</sup> *Ibid.*, 320 b.

his freehold interest was concerned (a). Notwithstanding what Bracton here says concerning a farmer, he afterwards lays it down most positively, in conformity with what was said above, that a writ of entry would not lie against one who held for a term of years, because he did not hold the freehold in demesne, but only the usufruct; and much less would it lie against a tenant from year to year.<sup>1</sup>

The writ of entry *ad terminum qui præterit*, which we have hitherto been speaking of, lay for that person who had himself made the demise: Different kinds thereof. when it was brought by the heir of the demisor, it was altered accordingly; as, *in quoddam, etc., non habet ingressum nisi per talem, cui talis pater*, or whoever the ancestor might be, *illud dimisit ad terminum qui præterit, etc.*<sup>2</sup>

Thus were writs of entry varied according to the circumstances of the case upon which they were founded; and some of them received appellations from the effective words in the writ. One was afterwards called a *cui in vita*; which was brought by a widow when her husband had made a gift of her inheritance. This writ was in the following form: *Præcipe, etc., quoddam, etc., reddat tali, quæ fuit uxor talis, etc., quam clamat esse jus et hæreditatem suam; et in quam prædictus talis non habet ingressum nisi per prædictum quondam virum suum, qui illud ei dimisit, CUI IPSA IN VITA SUA CONTRADICERE non potuit, etc.*<sup>3</sup> The usual answer to this action was, that the wife appeared on such a day personally in the king's court, and there, of her free will and consent, granted and confirmed the gift made by the husband; for proof of which the record thereof was to be inspected, where there ought to be special mention made that the woman consented: upon such consent, says Brac-

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(a) The tenant might pray in aid a third party. Thus, in a writ of entry, when the demandant alleged that the tenant only entered under one G., who had wrongfully disseized the demandant; and the third party, G., could come forward and show that he had the reversion in fee, and pray to be allowed to defend his right (*Year-Book*, 3 Edward II., c. 64). It was a great principle of the common law, carried out by a statute of Edward I., not to allow the right to the inheritance to be debated and decided in the absence of the party entitled to it, if he chose to appear and defend it. After the lapse of centuries, the same great principle of procedure still prevails and applies; and thus the present practice to let in the landlord to defend an ejectment, which Lord Mansfield in his time traced to this ancient doctrine of the common law; so enduring is a *principle* founded on substantial sense and reason.

<sup>1</sup> Bract., 321. *Vide ante*, 183, 184.

<sup>2</sup> Bract., 321.

<sup>3</sup> *Ibid.*, 321 b.

ton, a chirographum was made, which, together with the record, was now vouched; for it was a rule, that the record, without a chirographum, would not bar the widow's action. In other words, this was a plea of a fine. If a gift by the husband was what they called *voluntary*, it was not valid without the above circumstance of the woman's consent signified in court: but if the gift had been made, as they called it, *in causâ honestâ et necessariâ*, as to a son, or with a daughter in marriage, then it was binding upon the wife without these solemnities.<sup>1</sup>

Again, in case of a voluntary alienation of the wife's land by the husband, if she died before him, then the son who was her heir might have a writ of entry in the following words: *In quam non habet ingressum nisi per talem virum ipsius talis, cujus hæres ipse est, qui illam ei vendidit in vitâ suâ cui prædicta talis in vitâ suâ contradicere non potuit, etc.*<sup>2</sup> If a second husband aliened the wife's dower by her first husband, she might, after his death, have a writ of entry, *quam clamat esse rationabilem, etc., et in quam prædictus, talis non habet ingressum nisi per talem*, her second husband, *qui illud ei dimisit, cui ipsa in vitâ suâ contradicere non potuit, etc.*, and the heir of her first husband, in case she died before her second husband, might have a writ of entry applicable to the nature of his claim, whether the second husband held himself in seisin, or the wife had aliened: *In quam non habet ingressum nisi per talem, qui illud ei dimisit, et qui illud tenuit in dotem talis uxoris, etc.*, or, *nisi per talem, quæ fuit uxor talis, quæ illud tenuit in dotem, etc.*<sup>3</sup>

The cases in which a writ of entry was the proper remedy, were very numerous. We shall enumerate some of them. If an abbot, prior, or bishop, demised without assent of the chapter, or the chapter without assent of those whose assent was required by law; then there was a writ, *non habet ingressum, nisi per talem quondam abbatem, etc., qui illud ei dimisit SINE ASSENSU CAPITULI*,<sup>4</sup> and the like. The writ here mentioned was called a writ of entry *sine assensu capituli*. So if a wife demised without assent of her husband, *non habet ingressum nisi per præd. talem mulierem, quæ illud ei dimisit sine assensu et voluntate prædicti talis quondam viri sui, etc.* So if a bailiff demised without the consent of his lord. If a tenant was convicted of felony,

<sup>1</sup> Bract., 321 b, 322.<sup>2</sup> Ibid., 322.<sup>3</sup> Ibid., 323.<sup>4</sup> Ibid., 322.



the lord might have a writ to recover his escheat: *Non habet ingressum nisi per C. de N. qui eam TENUIT, etc., ET QUÆ, etc., ESSE debet ESCHÆTA propter feloniam de quâ idem C., etc., convictus fuit et damnatus, et quam terram idem C. dimisit, etc.,* which was called a writ of escheat. Again, if any one had his entry by one who held in villenage; by one who was *non compos sui nec sanæ mentis*; by one who held only for life, whether in dower or *per legem terræ*; the remedy was by writ of entry. In cases of a writ brought by the reversioner after an estate for life, the writ, after *ut dicit*, always had these words: *unde queritur, quòd ipse talis injustè EI DEFORCEAT, etc.,*<sup>1</sup> from which words the writ was afterwards named *quòd ei deforceat*.

A writ of entry lay, if any one intruded into the inheritance; *non habet ingressum nisi per hoc, quòd ipse se intrusit, etc.* If a man aliened land of which he had the custody; *non habet ingressum nisi per C. qui non nisi custodiam inde habuit, etc.,* with some small difference in the words when the heir claimed of his own seisin, and when of his ancestors; *dum idem B. fuit infra ætatem in custodiâ, etc.* It lay when a common of pasture was demised; *non habet ingressum nisi per C. (cujus hæres idem B. est) qui pasturam illam ei dimisit, ad terminum qui præteriit, etc.* But it only lay of a common in certain.<sup>2</sup> These, in addition to such writs as have been mentioned in the former part of this chapter, are all the writs of entry to be found in Bracton. These are applicable to very many cases of ouster of freehold; and from the general conception of *ad terminum qui præteriit*, and the infinitude of circumstances and situations which might be included within those general words, it was possible to make this remedy much more universal.

We have before examined whether a writ of entry would lie *against* a farmer, or tenant for a term of years.<sup>3</sup> We shall now see whether it would lie *for* persons of that description. It is said by Bracton, that a farmer who had demised *ad terminum qui præteriit*, might demand his own seisin, though he had no right in the freehold; for he had a possessory right of some kind or other; and therefore, according to our author, was entitled to an action grounded upon his own demise, and his own act.

<sup>1</sup> Bract., 323 b.<sup>2</sup> Ibid., 324, 324 b.<sup>3</sup> Vide ante, 182.

A writ of entry, however, brought by one who held for term of years, or for life, could never be turned into a writ of right; it being a rule, that an action upon the possession, merely, should never be turned into an action upon the right, nor *è converso*.<sup>1</sup>

Notwithstanding what was before said, of a writ of entry being limited to the time to which a writ of mortdaunce was confined, there was a case, where, of necessity, and because no other action could be had, this writ would lie beyond that period; as where one who held only for life, demised for a very long term, which exceeded the period of a writ of mortdaunce; and then as he had not such an interest as would entitle him to a writ to try the mere right, he was allowed to try the entry by a jury; as also was a tenant in fee, in the like circumstances, who could not count *de usu et expletiis*, which was always necessary in a writ of right.<sup>2</sup>

Another limitation of this action was the degrees within which it was confined. It never was allowed beyond three degrees; which were reckoned in this way. If the writ was of the kind we mentioned first, *ad terminum qui præterit*, on the demandant's own demise, this was one degree. If the tenant was said to have his entry *per* such a one, that constituted two degrees. If the entry was *PER* such a one, *CUI* the land in question was demised by some ancestor of the demandant, this was in the third degree.<sup>3</sup> A writ of entry was not allowed beyond this, and the party must, in case his demise was further removed, have recourse to a writ of right. It is stated by Bracton as a question, whether the passing of land from an abbot to his successor was counted as a degree, in like manner as from one heir to another; and he thought not: for though the person was changed, yet the dignity and capacity, which was the principal consideration, remained the same.<sup>4</sup>

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<sup>1</sup> Bract., 326 a, b.<sup>2</sup> Ibid., 326 b.<sup>3</sup> Fleta, 360.<sup>4</sup> Bract., 221.

## CHAPTER VII.

### HENRY III.

WRIT OF RIGHT IN THE LORD'S COURT—PROCESS IN REAL ACTIONS—SUMMONS—OF ESSOINS—DE MALO LECTI—DEFAULTS—MAGNUM CAPE—WARRANT DE SERVITIO REGIS—PARVUM CAPE—WRIT OF QUO WARRANTO—THE COUNT—TENDER OF THE DEMI-MARK—DEFENCE—OF GRANTING A VIEW—VOUCHING TO WARRANTY—NATURE OF WARRANTY—PROOF OF CHARTERS—WARRANTIA CHARTÆ—OF PLEADING—OF PROHIBITIONS—ATTACHMENT SUR PROHIBITION—OF JURISDICTION—ABATEMENT OF THE WRIT—PLEAS TO THE PERSON—OF BASTARDY—WRIT TO THE ORDINARY—OF MINORITY—EXCOMMUNICATION—PARCENERS—PLEAS TO THE ACTION—NON TENURE—MAJUS JUS—RELEASE—FINE AND NON-CLAIM—OF PERSONAL ACTIONS—ATTACHMENT—EXECUTION OF THE WRIT.

HAVING gone through assizes and recognitions, which went upon a possessory right, to recover a man's own seisin, or that of his ancestor, and also suits upon an entry, it remains only to speak of an action for the recovery of a right and property grounded either upon a man's own seisin, or that of his ancestor, who did not die thereof seized; in which action both the right of possession and the right of property were determinable; and after judgment therein, either upon the assize or duel, no recourse could be had to any other remedy, the judgment being, that the demandant should recover seisin to him and his heirs quietly, as against the tenant and his heirs forever.<sup>1</sup>

The writ of right and the proceedings thereon are treated more fully by Glanville than any other action; but this, as well as other branches of learning, had made great advances in improvement since the time of that writer; these are stated very minutely in the great authority by which we are so much assisted in our inquiries during this reign; and we should not fulfil our duty to the reader if we withheld such further information as can be derived from that source, on so important an article as the proceeding in a writ of right. Should the reader be a little re-

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<sup>1</sup> Bract., 327 b, 328.

tarded by sometimes recurring to what has been before said on the same subject, it is to be hoped that, on this, as on other occasions, his patience will be rewarded by the new lights which he will thence receive, to guide him in the future progress of this history.

The writ of right to the lord's court underwent no change in its form and language, though that Writ of right in the lord's court. in the king's court had some few words inserted which were not in it in Glanville's time. The words which mention the land to be held of the king *in capite* were probably added in consequence of the provision of *Magna Charta* about *præcipes in capite*, with design to show that the present was a proper subject for the king's court, and not within the prohibition of that act.<sup>1</sup> The writ ran thus: *Præcipe, etc., quodd, etc., reddat, etc., tantum terræ, quod clamat esse jus et hæreditatem suam, et tenere de nobis in capite; et unde queritur, quodd, etc.,* and so on, as in the old writ; only the return was *coram justitiariis nostris apud Westmonasterium*.<sup>2</sup>

Since the provision of *Magna Charta* about *præcipes in capite*, writs of right were, of course, more generally brought in the lord's court, and from thence were removed to the county, and sometimes to the superior, court. The removal to the county was allowed only when the lord was proved *de recto defecisse*. Many were the occasions when this failure of justice might be said to happen; as when the deforciant claimed to hold of a different lord from the demandant; when the real lord had no court, or refused to hear the cause, or no one was in court to hear it: in which cases, recourse could not be had to the chief superior lord, because the writ directed particularly, *si, etc., non fecerit, VICECOMES hoc faciat*. Again, if a person who lived out of the lord's jurisdiction was called to warranty, if the deforciant essoined himself *de malo lecti* out of the limits of his jurisdiction, where the four knights could not make the view; if the tenant put himself on the great assize: all these, and an infinitude of other matters, were causes of removal, as producing a failure of justice. The method of proceeding in the lord's court was different in different places; only in praying a view, vouching to warranty, and sometimes in pleading, in waging duel, and

<sup>1</sup> *Vide* vol. i., 437.

<sup>2</sup> *Bract.*, 328 b.

in some other matters, the course of the king's court was observed.<sup>1</sup>

When the officer, or serjeant sent by the sheriff, had attested in the county court that there was a failure of justice in the lord's court (and the officer's report in this point was a record), then the demandant prayed the judgment of the court thereon; and accordingly the tenant was commanded to be summoned to answer at the next county court, at which time they might either appear or essoin themselves. If the demandant appeared, but the tenant did not, then, upon the summoner attesting the summons, he was proceeded against for the default, according to the custom of different counties, either by caption of the land into the king's hands, or otherwise. The custom in the county of Lancaster, which is said to have been approved by the famous Pateshall, was this: the tenant was summoned twice, and if he did not then appear, and the summons was proved, the judgment of the court was, *quodd capiatur parvum nampium* on the land, in name of a distress, and the tenant was summoned a third time to appear at the third county; if he did not then come, the judgment was, *quodd capiatur magnum nampium*, that is, the *averia* and chattels, double the first, by way of afforcing the distress, and he was summoned a fourth time, when, if he did not come, there was a *capiatur terra* into the king's hands, and a fifth summons; and if he appeared not, nor replevied the land, the demandant had judgment to recover seisin by default.<sup>2</sup> From this specimen of the practice in the county of Lancaster, we are left to conjecture what was the nature of that in other counties.

While the suit was in the county court, if a person was vouched to warranty, that court could not summon the warrantor, but recourse was had to the king's writ *de warrantia*, which commanded the person to warrant the land in question in the county; *et nisi fecerit, quodd sit in adventu justitiariorum, etc.*; so that, if the warrantor did not enter into the warranty in the county, day was given to all the parties before the justices *in itinere*, where the plea of warranty was determined, and then the principal suit was remanded back to the county court, if the justices so

<sup>1</sup> Bract., 329 b.

<sup>2</sup> Ibid., 330.

pleased, though that, as well as the warranty, might, *de gratiâ*, if they pleased, be determined before them without any writ of *pone*.<sup>1</sup>

If the tenant put himself upon the great assize, a day was given to the next county; and, in the meantime, he applied for a writ of peace till the coming of the justices at the next assize, which writ he was to obtain in person, because he was to make oath that he was tenant, and had put himself on the assize. The writ of peace, the prohibition to the sheriff, that for summoning the knights, and the assize, were much the same as in Glanville's time, both in the words and the practice of them; only the jurors were to appear *coram justitiariis ad primam assisam, etc.*<sup>2</sup>

Should a suit be removed by *pone* from the sheriff's court to the court above, in the interval, before the warrantor appeared before the justices itinerant, there was, however, no mention of the warranty in the writ of *pone*; but after the usual essoins and delays, the demandant counted afresh, from the day on which the vouching was in the county; and so the tenant was obliged to vouch again, and the day appointed before the justices itinerant became void.<sup>3</sup>

A writ of *pone* was rarely granted on the prayer of the tenant, except for some special reason, which was to be expressed in the writ, as thus: *Pone ad petitionem tenentis eò quodd agit in partibus transmarinis, etc., loquelam, quæ est, etc.* If the tenant could not appear, if the demandant was related to, or a servant or friend to, the sheriff; if he was very powerful in the county, or was sheriff himself; all these were causes sufficient to entitle the tenant to remove the suit (*a*). There were some cases in which the

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(a) In the county court, it is to be observed, the suitors or freeholders were the judges (*Year-Book*, 7 Edward II., f. 245), but not necessarily the *triers*; and they could, and at this time did, resort to juries for *trial*, although the jurors were at this time still regarded as *witnesses*; and the reason twelve were chosen was not that all must necessarily join personally in the verdict, but that some out of the number might be enabled to testify, and return a verdict of which the others may approve. Hence it was necessary to a jury that there should be twelve, even in the county court; and therefore, where on an issue joined in the county court, only six suitors could be obtained to try the case, it was removed into the king's court, and a jury was awarded *de viceneto* (*Year-Book*, 7 Edward II., 238). The case might be removed into the king's courts of oyer and terminer, which were courts of the

<sup>1</sup> Bract., 331.

<sup>2</sup> Ibid., 331, 331 b, 332.

<sup>3</sup> Ibid., 332.

demandant was obliged to remove the suit, on account of the privilege of the tenant; as where he was a Templar or Hospitaller, or of any other description of persons who had the privilege of answering to no suit, except *coram rege, vel ejus capitali justitiario*. There were cases of necessity in which also the suit was to be removed: as where bastardy or anything else was objected, which the county could not legally decide or try.<sup>1</sup>

In the same manner were suits removed from the county and court baron to the justices *in itinere*. There was also another cause of removal from the county court. This was on account of a false judgment, in which case, likewise, the removal was by *pone*.<sup>2</sup>

When the suit was thus removed by *pone*, the tenant was to be summoned to appear. The summons of the tenant is treated of by Glanville. Some few things may be added to render his account more satisfactory, as well as to give a comparative view of process in general, whether in actions real, personal, or mixed.

The most common process in use was the summons (*a*); and after that, in some cases, there followed either a caption into the king's hands for de-

Process in real actions.

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county, though not county courts (*Year-Book*, 7 Edward II., f. 231). If witnesses resided in different counties, as they would at this time be summoned as jurors, and the courts of the county could only summon the men of the county, that again would be a reason for removal into the king's superior court, which would have jurisdiction over the whole country (*Year-Book*, 7 Edward II., c. 231).

(a) Very early in the history of our law, it was recognized that it was part of the king's prerogative to see that justice did not fail. Before the Conquest, this was by writ to the sheriff, to direct him to hear the case in the county court (*Mirror of Justice*, c. 153); but after the Conquest it was recognized that causes of weight or doubt should not be allowed to be tried in the county court or other local tribunal, nor any cause in which it was likely for any reason that justice would fail. Hence, in the *Leges Henrici Primi*, among the king's prerogatives is mentioned "*defectus justitiæ*" (c. 10); and it is said that "*defectus justitiæ et violenta recti eorum destitutio est qui causas protrahunt in jus regum*" (c. 33). Before a "*curia regis*," as a permanent regular judicial tribunal, was established, causes were removed into the courts held by the king's justices itinerant; and thus it is said in the *Mirror*, that such cases as were too high for the sheriff to try in the county court were suspendable until the coming of the justices in eyre unto those parts (c. 2, s. 28). In the reign of Henry II., however, the *curia regis* (exchequer) heard common pleas, which were then removable there. There were many modes in which a failure of justice, *i. e.*, an evident necessity for its failure, might arise to warrant a removal from the local court, or even the county, whether, for instance, from defect of jurors, or want of power to

<sup>1</sup> Bract., 332.

<sup>2</sup> Ibid.

fault, or an attachment, according to the nature of the action. Another process was, what Bracton calls a command or precept of the king, without any other summons, *quodd sit coram eo responsurus*, or *facturus*, etc., or that he should have such a one there, *ad respondendum*, or *faciendum*. There was another, commanding the sheriff, *quodd faciat venire*, or *quodd attachiet*, or *quodd habeat corpus*, or *quodd ita attachiet quodd sit securus habendi corpus*. Many of these have been noticed in the foregoing account of proceedings. We shall now confine ourselves more particularly to the summons, which was the usual process in real actions, as well those that were possessory as those that concerned the *proprietas*; and also in personal actions, in matters of contract, or for any injury.

A summons was either *general* or *special*. There was a *general* summons before the eyre was held; this was to be in some very public place, and might be followed by *essoins*, to excuse the absence of those who ought to attend. A *special* summons was in some particular action, to which if a person did not appear, he would be in default, although he was *essoined* upon the general summons (a).<sup>1</sup>

summon witnesses. And it is to be borne in mind that at this time jurors were witnesses. Thus in an assize of novel disseisin, when the tenant set up a release, the witnesses of which were in divers counties, the case was removed into the king's court at Westminster, which had jurisdiction over the whole country (*Year-Book*, 7 Edw. f. 231). So, where an issue was joined in a local court in a writ of right, and only six suitors could be obtained to try the case, it was removed into the king's superior court, and a jury was awarded, "*de vicineto*" (*Year-Book*, 7 Edw. II., fol. 238). In the county courts or courts baron, it will be observed that the freeholders or "suitors" were judges (*Year-Book*, 7 Edw. II., f. 249), but not necessarily the *triers*, as they could try by jurors or sworn witnesses of the matter. But in each local court the judges or jurors must come from the freeholders, suitors to that court. And therefore, in a hundred court or court baron, where the number of suitors was small, it might often be that there were causes which would prevent a fair and proper trial, as if the lord, in the hundred court or court baron, or the sheriff in the county were interested (*Year-Book*, Henry IV.; 14 Henry VI., f. 1); or any great nobleman of much influence in the county (*Year-Book*, 32 Henry VI., 9); or if there were great writs raised on one side or the other (*Year-Book*, 7 Henry VI., f. 9; 32 Henry VI., f. 9; 3 Henry VI., f. 24); for though (as it was then said) the other party might be willing to refer the case to arbitrators chosen by *both*, for they would be indifferent; yet, where any of the jurors were chosen by one side only, it was a good cause of challenge (*Ibid.*). There were various modes provided for removing causes from the local courts into the king's courts, as writs of *pone* or *recordari* (*Year-Books*, 7 Edward IV., 23; 34 Henry VI., 4). The plaintiff could always remove, the defendant not without cause (*Fitz. N. B.*, 70).

(a) Two things are remarkable here, how closely the *Mirror* follows Bract.

<sup>1</sup> Bract., 333.



What we have to say upon summons will be chiefly confined to this latter kind. It appears from Bracton, that if the party could be found any-<sup>Summons.</sup>where in the county, he might be summoned; though if the summoners could not find him at his own house, they needed only show the summons to some of his family, and not seek him further. If he had more houses than one in the county, the summons was to be at that where he mostly lived, or had the most substance; if he had no house nor demesne, it was to be at his fee. The summoners were to be at least two in number, who were to testify before the court that they had executed the summons. A summons ought always to be served fifteen days before the day on which the party summoned was to appear; and if there were fewer days, the summons was illegal, unless in some particular cases where despatch was required; as when a church was vacant; when the parties were living in the county where the eyre was; or in cases where merchants were concerned, who were entitled to what Bracton calls *justitia pepoudrous*. Again, on the other hand, sometimes a longer time was allowed for summoning; as on account

ton in the chapter on "summons," and how entirely the present law, after the lapse of seven centuries, has gone back to what it was in the time of Bracton, inasmuch as summons is now the only process for the commencement of all actions, real and personal. The chapter in the *Mirror* distinguishes special summons from general, and treats of special summons just as Bracton does. Treating of what is a reasonable summons, it says, "It is a reasonable summons when it is testified by two credible witnesses, neighbors to the person, or house, or tenement named in the writ, with a warning given of the day, place, party, judge of the cause, and a reasonable respite—at least fifteen days—to provide his answer, and to appear in judgment" (c. ii., s. 29). Here, again, it may be observed, that fifteen clear days is now the period allowed in actions of ejectment, the only remedy for the recovery of real property. And Bracton says, "*Sciendum quod quindecim dies ante diem summonitio dici debeat legitima. Si autem minus spatium contineat possit illegitima judicari nisi ob causam legitimam minus tempus statuatur. Ut si propter causam quæ instantiam desiderat, propter rem fortè quæ tempore peritura sit, vel propter alias causas ubi induciæ arbitrarie sunt, propter necessitatem, item propter personas qui celerem habere debent justitiam, sunt mercatores, etc., et sic ex causa moderatur tempus summonitionis et contineat minus tempus,*" etc. (*Ibid.*). The same distinction was drawn through the entire procedure. See the chapter "De Essoniis." Glanville also states that there were no essoins, *i. e.*, excuses for non-appearance, allowed in assizes of "novel disseisin," *i. e.*, recent forcible dispossession, as these cases raised no question of difficult or doubtful right. On the same principle, Fleta says that in mercantile causes (*causæ mercatorum*) less time will be sufficient than in real actions (lib. vi., c. vi., s. 11). So, in criminal cases, process was more speedy, and Coke says might be returnable the same day (2 *Inst.*, 568).

of a journey; and the time was lengthened according to the length of such journey. But the common and legal summons, says Bracton, was fifteen days before the appearance.<sup>1</sup>

A summons was illegal, if it was made only by one summoner; or by false summoners, and not by the sheriff and his bailiffs. Again, if it was made when the tenant was beyond sea, or upon his journey, or even *cum iter arripuerit*, when he was just set out; or if he was not found within the county, the summons was not binding;<sup>2</sup> for a man was not to accept a summons at all times and places, nor from everybody, but only from those who had a proper authority.

When the tenant appeared, he might object any of the above irregularities as an exception against the summons. If he did not appear at the day of the summons, and the sheriff did not return the writ, recourse must be had to another writ, that being now out of date; but if the sheriff had returned the writ, then, on account of the tenant's default, if it was in a real action, his land was taken, as in Glanville's time; but the writ on this occasion was now called *magnum cape*; and if, after the first caption, he failed appearing at another day, he lost his seisin. There was another caption of the land by force of a writ that was called *parvum cape*; in all defaults after the first appearance the caption was made by *parvum cape*, which was the case in which Glanville says he could not replevy.<sup>3</sup> Thus, whereas in Glanville's time the caption was not till the tenant had been summoned three times, it was now after the first summons that the *magnum cape* issued.

If a person was lawfully summoned, and did not appear, he would be punished as a defaulter, unless he could send a proper excuse or essoin. The law of essoins has already been mentioned; but it is treated so minutely by Bracton, and was of such importance in the judicial proceedings of this period, that it deserves to be reconsidered.

One principal excuse for not appearing to a summons, was being *in servitio regis* (a). This, however,<sup>4</sup>  
 Of essoins. was not admitted as an excuse if the party had

(a) Here again the *Mirror*, in a chapter on the subject, follows Bracton:—  
 "Essoin is an excuse of a default by any hindrance in coming to the court,

<sup>1</sup> Bract., 333 b, 334.

<sup>2</sup> Ibid., 336 b.

<sup>3</sup> Vide vol. i., 389.

<sup>4</sup> Bract., 336 b.

been first summoned, because he might have sent his attorney to appear for him; nor even then would it avail, if he could conveniently come himself, or send. But this is laid down as the strictness of law by Bracton, who admits that the king's pleasure should prevail, notwithstanding any of the above circumstances. The next essoins were what were called in Glanville's time, *ex infirmitate veniendi*, and *ex infirmitate<sup>1</sup> reseantisæ*, which were now termed *de malo veniendi*, and *de malo lecti*. Besides these, there were several others that recurred less frequently; as a peregrination, or any restraint imposed on a party; or if he was detained by enemies, or fell among thieves;<sup>2</sup> or was stopped by floods, a broken bridge, or tempest; unless, indeed, it could be proved that he set out at an unseasonable time, or suffered those impediments through want of proper caution and care on his part. Being impleaded in the king's court, was a good reason for not attending in an inferior one; or even, according to Bracton's opinion, being impleaded in the ecclesiastical court was a good excuse.

A person having any of the before-mentioned excuses ought to send one to make it for him. The form of making the essoin was to say, "that his principal, as he was coming to the court (if it was the essoin *de malo veniendi*), was seized with an infirmity in the way from his house to the court, so as not to be able to come either *pro lucro* or *pro damno*, and that he was ready to show this." It was not now the practice, as it had been,<sup>3</sup> for the essoniator to give any surety for proving the truth of this, but credit was given to his verbal declaration; though it seems, that in the case of barons, and other great persons, who could better command a security, the law imposed on them the burden of finding pledges. In common cases, therefore, the essoniator gave his faith, that he would produce his principal at another day, to warrant the essoin, and prove it<sup>4</sup> upon his oath.

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and lieth as well for the plaintiff as the defendant. The law of every essoin is that the cause of the hindrance is to be enrolled with the name of the essoiner, so that if the adverse party or his attorney or essoiner will traverse the cause, he is to be received so to do; that if it be found false, then the essoin be turned to a default." Hence the various essoins or causes of excuse are stated very much the same as in Bracton (c. ii., s. 30).

<sup>1</sup> Vide vol. i., 386.

<sup>2</sup> Bract., 337.

<sup>3</sup> Vide vol. i., 387.

<sup>4</sup> Bract., 337 b.

As in actions, so in casting essoins, a certain order was to be observed: thus, if a person was detained by some illness, he would cast the essoin *de malo veniendi intra regnum*, and this might be followed by that *de malo lecti*; after this, the party would not be permitted to remove himself *extra regnum*, so as to cast the essoin *de ultra mare*. The essoin *de ultra mare* was of various kinds, namely, *de ultra mare Græcorum*, and *de citra mare Græcorum*. In the simple essoin *de ultra mare*, there was a delay of forty days at least, and one ebb and one flood. If there was mention of any remote place, accompanied with some cause of necessary absence, as a peregrination to St. Jago, or being with the army in Germany or Spain, then a longer time was allowed, according as it should seem proper to the justices. The same discretion might be exercised by the justices, where the absence was in some distant part of the kingdom; but they could never shorten the legal period of fifteen days. The essoin *ultra mare Græcorum*, was usually in cases of peregrination to the Holy Land. And here they made a distinction between a *simplex peregrinatio* and a *generale passagium*. In the former, the time allowed was, at least, a year and a day:<sup>1</sup> in the latter, the plea remained *sine die*. This latter privilege was granted in favor of those who were *cruce signati*, and it seems to have been allowed in consequence of a papal decree which declared, that till the death or actual return of such persons, all their property should remain entire and untouched.

It was held that a person might have the essoin *de peregrinatione ad Terram Sanctam*, and afterwards that *de ultra mare*: and then when he returned he might have that *de malo veniendi*, and afterwards that *de malo lecti*: but if he had had that *de malo veniendi*, he could not, as was before said, recur to that *de ultra mare*; and if he had had that *de ultra mare simpliciter*, he could not have that *ad Terram Sanctam*, the rule of essoins being *approximare possunt regno, cum fuerint implacitati elongare autem non*. A person who was absent upon a *simplex peregrinatio*, and stayed beyond the year and day, might have another forty days, and one flood and one ebb, by reason of the essoin *de ultra mare simpliciter*; and if he still stayed, he might have fifteen days at least, by an essoin *de malo veniendi*

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<sup>1</sup> Bract., 378 b.

*citra mare*, and if a reasonable cause could be showed, the justices, as we have before seen, might allow more. After this, if he did not appear, he would be in default.<sup>1</sup> Indeed, when a person, by casting the essoin *de malo veniendi*, admitted himself to be on his road to the court, there would have been an absurd contradiction in allowing him to cast another, which expressed that he was out of the kingdom. The essoin *de servitio regis* was likewise sometimes *in regno* and sometimes *ultra mare*, and this likewise was sometimes followed by that *de malo veniendi*, and afterwards by that *de malo lecti*.<sup>2</sup>

The essoin *de servitio regis*, which was more peremptory than any of them, being without any limitation of time, was not allowed in certain pleas. Thus, it was not allowed in an assize *ultimæ præsentationis*, for fear of the lapse; nor in dower, because of the consideration due to a widow who had only a life-estate; nor, as some thought,<sup>3</sup> in the *assisa mortis antecessoris*, in favor of the infant. It did not *de jure* lay for a person not immediately in the king's service, though it was allowed *de gratiâ*, as was before said; nor for one constantly in the king's service, unless while he was actually employed in some expedition; it did not lay for the attorney, as a person so engaged should not be an attorney. Bracton repeatedly lays it down, that the king's warrant for this essoin should never be granted but on a reasonable cause; though on the other hand, he is as explicit in declaring that, whatever might be the cause, the justices should not quash it, but wait the king's determination thereon.

The essoin *de malo veniendi* implied that the party was taken ill on the road, and therefore, if the essoniator, upon interrogation, said he left him ill at home, it would not be allowed, though a case might happen, where of necessity it must be received; as if the party had been essoined *de malo lecti* in some other action, and *languor* was adjudged, he must, under that return, confine himself to his house; and therefore, when summoned in another action, and entitled to the essoin *de malo veniendi*, it must of necessity be received, though he was actually in his own house. The confinement which the adjudication of *languor* imposed on the party dispensed with the strictness otherwise observed in this and some other cases.<sup>4</sup>

<sup>1</sup> Bract., 339.<sup>2</sup> Ibid., 338 b.<sup>3</sup> Ibid., 339 b.<sup>4</sup> Ibid., 340.

Having thus mentioned generally the nature and effect of these essoins, it next follows that we should inquire by whom and where they might be used. In the first place, no minor, when known to be such, could essoin himself; nor could a person of full age be essoined against him, especially in an assize; for a person of full age, if present, could say nothing to prevent the taking of the assize, though it should seem as if he might be essoined in a suit for land of which he was first enfeoffed himself. The reason given by Bracton why a minor should not be essoined is, because he could not swear nor warrant the essoin. No essoin lay for a disseizor, for though he did not come, his bailiff might; nor for the bailiff. This rigid practice seems to be *in odium spoliatoris*,<sup>1</sup> who ought not to be indulged with a delay of fifteen days, though it lay for the demandant, who was the person spoiled. It did not lay for one committed *corpus pro corpore* in custody to answer, nor for any one where the sheriff was commanded *quodd faciât eum venire*, or *quodd habeat corpus ejus*, if the process had gone through the whole *solennitas attachiamentorum*; but on the first day of attachment the party might have an essoin; for it was a general rule, that *de jure* an essoin might follow every summons or attachment where a plea depended; on the contrary, it was a rule, *ubi nullum placitum, ibi nullum essonium*.

An essoin did not lay for a person who had appointed an attorney, unless they had by accident both essoined themselves, nor for one who had already essoined himself till he appeared, nor for one appealed *de forcia*, nor in an appeal *de pace*, *de plagis*, or *de roberiâ*, notwithstanding which it is laid down by Bracton, that if such persons did not appear, they would be excused by proper essoin. Sometimes there would be a *dies datus consensu partium sine essonio*, and in such case, neither would be permitted to essoin. If a person was seen in court before the essoin was cast, the essoin would, nevertheless, be admitted. An essoin would not lie after a caption of land *in manus regis* for a default.<sup>2</sup>

If a writ was against several who held *in communi simûl et pro indiviso*, each might have an essoin *de mali veniendi* together on the same day, or one after another on diverse

<sup>1</sup> Bract., 340.

<sup>2</sup> Ibid., 341.

days,<sup>1</sup> till each had had an essoin; and none should have more than one essoin till all had appeared together, so that those who were essoined first might have several appearances, and several days, till all appeared together; but an essoin was not allowed at every appearance, on account of the infinite delay this would occasion. If the inheritance had been divided, and one was impleaded alone for his part, and he declined answering without his *participes* or parceners, and they were summoned, each had one essoin before appearance but not *vicissim*, till it was established that they were *participes*, and then they essoined *vicissim*, as before mentioned. If the tenants to the writ were not *participes*, but held by different rights, they could not essoin *vicissim*, because these were different pleas; the same where they held *pro diviso*. But husband and wife might essoin *simul et vicissim*, like *participes*, on account of the entirety of their rights; and if one made default, it affected them both, which was not the case even with *participes*.<sup>2</sup> When all the parceners had appeared together, and it happened that one or more of them afterwards essoined himself, or a day was given to the parties, if present, they might recommence their essoins, as at the first day of summons. In like manner, if the writ contained more than one demandant, whether they were *participes* or husband and wife, they might essoin *simul et vicissim*.

If a demandant or tenant, not choosing to appear himself, appointed an attorney, then the essoin was to be made in the person of the attorney and not in that of the principal, except, as will be seen hereafter, in the essoin *de malo lecti*.<sup>3</sup> Yet, if the attorney should die, the principal might essoin himself and his attorney *de morte*, as it was called, and he might remove his attorney and essoin himself; but it was only in these two cases that the party could cast an essoin after appointing an attorney.<sup>4</sup>

If one or more persons were vouched to warranty, before appearance both voucher and vouchee might have an essoin; and if the vouchers were more than one, they might essoin *simul et vicissim*, as before mentioned; so if the tenants were more than one.<sup>5</sup> After the wager of duel, the champion as well as his principal might essoin *simul et vicissim*.

<sup>1</sup> *Simul et vicissim*.<sup>2</sup> Bract., 341 b.<sup>3</sup> Ibid., 342.<sup>4</sup> Ibid., 342 b.<sup>5</sup> Ibid., 343.

The time for making the essoin was the first day, that is, on the return of the writ; and it was not sufficient, says Bracton, if the essoin was made on the second, third, or fourth day; yet, adds the same authority, the person summoned was to be *expected* till the fourth day, in case he should come or send a messenger to excuse his absence, if he had such matter to allege as would constitute a good essoin; and if he had, and caused himself to be essoined even on the second or third day; it seems, from Bracton, that the essoin would be allowed, and a day would be given him by his essoniator; yet, at that day, if the demandant pleased to proceed on the default, the court would allow him so to do; and if the tenant could allege none of the excuses above mentioned for his delay, he would lose his seisin.

The essoin was to be made in open court, before the justices; nevertheless, if by mistake it was made before another, it was allowed *de gratiâ*, like the essoin cast after the first day, as just mentioned; and the default would be saved, unless the demandant proceeded for judgment on the default, when such an essoin would be adjudged to be null and void.

An essoin might be had upon every appearance and day given in court, whether on praying a view, vouching to warranty, or on a day given *spe pacis*, as it was called, at the prayer of the parties, in order to compromise the matter in dispute, or for any other purpose.<sup>1</sup>

The essoin that occasioned most discussion in the practice of real actions was that *de malo lecti*, which commonly followed immediately upon that *de malo veniendi*; for where a person, having been detained on the road by sickness, and having cast the essoin *de malo veniendi*, had found himself obliged to return home, the order of essoins, conformably with what was likely to be the real fact, led to the essoin *de malo lecti*. Upon this, it was usual for the court to direct *a view*, to see whether it was, as they called it, *malum transiens*, or whether it was *languor*: if the former, then he had another day, at the distance of fifteen days at least; if the latter, he had the space of a year and a day. But the essoin *de malo lecti* did not in all cases follow that *de malo veniendi*. It did not follow

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<sup>1</sup> Bract., 344.



it in a writ of entry, unless when the writ of entry was turned into a writ of right by the form of counting; so on the other hand, when a writ of right was by the form of counting turned into a writ of entry, and the tenant put himself upon a *jurata*, the *essoin de malo lecti* would not be allowed; the same, if in a writ of right the counting was of an inheritance descending from a common stock to co-heirs, for this could not be determined by the duel or great assize. For the same reason it was not allowed in a writ of right of dower; it being laid down as a general rule by Bracton, that where the duel or great assize might follow, and as long as the duel or great assize might be had, there, and so long this *essoin* would lie, and that where and when either of those trials could not be had, it did not lie.<sup>1</sup>

This seems to be a better rule than to say that the *essoin de malo lecti* lay in all writs of *præcipe*; for though it did lay in writs of right as long as they retained their primary nature, yet, as this might be changed by the form of counting, it became a less certain rule than the other. However, by one or other of these rules it might easily be pronounced whether both the *essoins de malo veniendi* and *de malo lecti* lay, and where only the former.<sup>2</sup>

The *essoin de malo lecti* would not lie, even in the actions before mentioned, for any of the following persons. Thus, it would not lie for a demandant, though he might have that *de malo veniendi*, but his pledges would be exacted if he made default in appearing; nor for an attorney, though, if an attorney was *longuidus*, this was such an insurmountable impediment, that it would, from necessity, be admitted as an excuse, but not till the fourth day. It would not lie for a warrantor till he had entered into the warranty; because then he might put himself on the duel or great assize. It would not lie before the *justitiiarii itinerantes*, for a person residing in the same county, because he might appoint an attorney;<sup>3</sup> nor, for the same reason, where the tenant lived in London.<sup>4</sup> Nor would it lie where it was not preceded mediately or immediately by the *essoin de malo veniendi*, but an *essoin de malo lecti*, so cast, would be turned into that *de malo veniendi*, and would operate only as such.<sup>5</sup>

This *essoin* ought to be made on the third day inclu-

<sup>1</sup> Bract., 344 b.

<sup>2</sup> Ibid., 346 b, 347.

<sup>3</sup> Ibid., 349 b.

<sup>4</sup> Ibid., 350.

<sup>5</sup> Ibid.

sively before the day given by the *essoniator* in the *essoïn de malo veniendi*, and it ought to be cast by two persons, who were called, not *essoniators*, but *nuntii*, messengers; because they were sent to make an excuse, says Bracton, and not to *essoïn*; for they received no day, nor did they swear to have a warrantor at a certain day to prove the *essoïn*. This distinction between an *essoniator* and *nuntius* was very material, and was known in other instances than this of the *essoïn de malo lecti*. An *essoniator* must come from the party; a *nuntius* might come either from the party or of his own head, to inform the court of any impediment that prevented the party's attendance, and he would be heard so late as the fourth day, or later, down to the time of judgment on the default.<sup>1</sup> It was by a *nuntius* as well as by an *essoniator*, that many of the before-mentioned excuses for non-appearance used to be made.

When, therefore, the *nuntius* had delivered the excuse, the demandant had a writ *de faciendo videre*,<sup>2</sup> directed to the sheriff, to this effect: *Mitte quatuor legales milites de comitatu tuo apud villam, etc., ad videndum utrum infirmitas, quâ A. in curiâ nostrâ coram justitiariis nostris apud W. essoniarit se de malo lecti versus N. de placito terræ, sit languor vel non. Et si sit languor, tunc ponant ei diem à die visûs sui in unum annum et unum diem apud Turrin Londini, quodd tunc sit ibi responsurus, vel sufficientem pro se mittat responsalem. Et si non sit languor, tunc ponat ei diem coram justitiariis nostris apud W., etc., quodd tunc sit ibi responsurus, vel sufficientem pro se mittat responsalem. Et dic quatuor militibus illis quodd sint coram iisdem justitiariis, etc., ad terminum prædictum, ad testificandum visum suum, et quem diem ei posuerunt; et habeas ibi nomina militum, etc.*<sup>3</sup> This writ was to be faithfully and literally executed by the sheriff, and needs no other observation except in that passage where a day is given at the Tower. Bracton says, this was done because the constable was always present there to receive the appearance of parties, who perhaps had a day to appear, when no justices were sitting on the bench at Westminster. However, if it happened that the justices were sitting, the party was still to keep his day before the constable; and the constable would give him a day, either before the justices of the bench, or, if the pleas were adjourned before the justices itinerant, then at the eyre.<sup>4</sup>

<sup>1</sup> Bract., 345.<sup>2</sup> Ibid., 351.<sup>3</sup> Ibid., 352 b.<sup>4</sup> Ibid., 353.

If the four knights, or any of them, failed to appear to make certificate of their view, process of attachment issued against them; for neither the view nor certificate thereof could be made by less than the four knights named; and therefore, if one of them died, a new writ issued for the sheriff to substitute another.<sup>1</sup>

It was a rule, that after the *essoin de malo lecti* was received, the party should not *surgere*, as it was called, that is, not stir abroad, much less appear in court, without having *licentia surgendi*. This license was to be obtained by sending some person to inform the justices that the party essoined had recovered his health. The strictness with which the person essoined was to observe the *essoin* as well before view as after judgment of *languor* was pronounced, is very singular. Bracton declares, that *decinctus, et sine braccis, et discalceatus se tenere debet in lecto*; yet he adds, *alicubi poterit indui vestimentis si voluerit*: however, if he went out of his chamber, he was not to go out of his house, under pain, if found abroad, of being arrested by the demandant, and of losing his land as a defaulter in breaking his *essoin*. Such arrest, indeed, ought properly to be made by the coroners or some officer of the king's court. When the officer came with sufficient testimony of other good and lawful men to prove that he had broken his *essoin*, the party might endeavor to prove the contrary; he might say, *quodd cum esset tali die apud talem locum et in lecto, sicut ille cui languor adjudicatus, et in pace domini regis, venit ibi ipse talis petens, et nequiter, et IN FELONIA extraxit eum è domo sua, et à lecto suo, et in roberia abstulit ei tantum, contra pacem domini regis; et sic offert, etc.* Upon this, a proceeding would commence, as in an appeal, and the matter would be determined by the duel, or inquisition; and according to the event of this trial, one of the parties would lose forever; the tenant, *quia stultè surrexerit*; the demandant, because he maliciously drew the party essoined from his house; and as he meant to gain something by that proceeding, it was but reasonable, says Bracton, that he should likewise be a loser. If the tenant was arrested in a manifest act of breaking his *essoin*, the demandant might tacitly waive the default in this, as in other cases, by doing some act which showed he did not mean to pro-

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<sup>1</sup> Bract., 354.

ceed on the default, as taking a day, *prece partium*, or the like.<sup>1</sup>

Although before the view the party essoined might obtain *licentia surgendi*, yet afterwards, and when *languor* had been adjudged, he would be obliged to confine himself in the way above mentioned, without any *licentia surgendi*, the justices having no jurisdiction to grant it; for the day now stood before the constable whose duty it was to remit the plea to the justices.<sup>2</sup> At the end of a year and a day, the party was to appear in person, or, if unable, he was to send a *responsalis*: no essoin could now be had, that *de malo lecti* being the last. If he was still unable to appear, there only remained for the justices to adjudge it *morbus sonticus*. Whatever was done, the constable was to make a record thereof, and transmit it to the justices, and give a day before them *in banco*. Thus ended the authority of the constable. If this essoin was made not in the king's but the sheriff's court, then, instead of the Tower of London, some castle, or other certain place within the county, was appointed for the appearance at the end of a year and a day.<sup>3</sup> If the party did not keep the day appointed by the four knights, his land was taken by *parvum cape*, the same as if he had actually appeared, because the return of the knights was as a record which the party essoined was not permitted to deny.

There was another essoin, which was considered as anomalous, and not at all within the course and rule by which other essoins were governed. This was the essoin *de malo villæ*; which was when the party had appeared, but was afterwards, before any answer to the suit, taken ill in the town where the court sat, and was unable to attend. This, like the essoin *de malo lecti*, was signified, not by an *essoniator* but a *nuntius*. The party was to send two different *nuntii* every day, for four days; on the fourth day the justices were to send four knights to the sick person, to accept an attorney from him, and if he was not to be found, he would be in default. This essoin *de malo villæ* did not lie in the county court, nor before the justices assigned to take any assize, or jury, nor in any case where the party was not to be expected till the fourth day.<sup>4</sup> (a)

(a) The subject is treated more fully in the *Mirror* in several chapters. First, of defaults in personal actions: the defendants were distrained to the

<sup>1</sup> Bract., 358.

<sup>2</sup> Ibid., 358 b.

<sup>3</sup> Ibid., 363.

<sup>4</sup> Ibid.

We have seen what was the method of casting an essoin in order to save a default on the return of the writ of summons. We now come to speak Defaults. more particularly of *defaults*, and their consequences. This, like most other subjects, is handled very fully by Bracton, with whose assistance we may attain a complete idea of this part of our ancient judicial proceedings.<sup>1</sup>

If the tenant sent no essoin, nor appeared the first day, nor the second, third, nor fourth; then, provided the demandant *obtulit se* on either of those days before the fourth, the land would be taken into the king's hands; which caption was not followed by any severe penalty: for if the tenant appeared within fifteen days after the caption, and demanded the land in court *per plevinam*, and if at the day given, he could do away the default, the possession would be restored, or, as Bracton calls it, *reformed*. It seems, that if the tenant failed to appear the first day, and the demandant did appear; then, notwithstanding the tenant appeared the day after, if he could not save his default, he would lose his seisin. If neither appeared the first day, and both on the second, one default was set against the other, and no advantage could be taken by the demandant; and so of the other days down to the fourth: the same, if the demandant appeared the first day, and the tenant not, and the tenant the second, but the demandant not. If they both appeared on the third, one default was set against the other.<sup>2</sup>

During the four days, the demandant and tenant were

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value of the demand, and afterwards they were to bear judgments for their default, and for default after default, judgment was given for the plaintiff. The usage was changed in the time of King Henry I., that no freeman was to be distrained by his body for an action personal so long as he had lands, in which case the judgment by default was of force, until the reign of Henry III., that the plaintiff should recover his tenure of land, to hold the same after default, until due satisfaction was made. In personal actions, however, in which the defendants were not freeholders, they used to be punished in this manner: First, process was to be awarded to arrest their bodies, and those who were not found were outlawed. Then, as to defaults in real actions, they were punishable thus: at the first default, the plaintiff was seized to the value of the demand, or, after appearance, the seizure was to be adjudged to the plaintiff to hold in the manner of a distress; and if any one appear in court, he was to answer to the default, which he might do by denying the summons, because he was never summoned, or not reasonably summoned. In mixed actions, the parties were distrained by their goods and lands until they answered.

<sup>1</sup> *Vide ante*, 143.

<sup>2</sup> Bract., 364 b.

allowed to show excuses for their non-appearance; and the tenant might excuse himself even after the four days, if the ground of his excuse was such an impediment as really prevented his appearing, and he had sent a messenger to notify it within the four days. The grounds of excuse which the court would allow, were such as the following: He might say that he was put under restraint or imprisonment (provided it was not on account of any crime); that he fell among robbers, who bound and detained him, so as to prevent his sending a messenger; that he was stopped by flood, snow, frost, or tempest, by a broken bridge, or the loss of a boat, if there was no other safe passage.

If within the fourth day he neither came, nor sent some such excuse for not coming, the following entry was made: *A. obtulit se quarto die versus B. de placito quodd red-dat ei tantum terræ, etc. Et B. non venit. Et summoveas, etc. Judicium, etc.*, that the land should be taken into the king's hands; upon which there issued the writ of *magnum cape*, as it was called, to this effect: *Cape in manum nostram per visam legalium hominum, etc., quam A. in curiâ, etc., clamat ut jus suum versus talem pro defectu ipsius B. Et diem captionis scire facias justitiariis, etc. Et summoveas, etc., prædictum B. quodd sit coram iisdem, justitiariis, etc., inde responsurus et ostensurus quare non fuit coram iisdem justitiariis, etc., sicut summonitus fuit; or, as the case might be, quare non observavit diem sibi datum per essoniatorem,*<sup>1</sup> etc. The writ of *magnum cape* was the process in all defaults before appearance in court; or, what amounted to the same thing, before the appointment of an attorney.

The day of the caption ought to be indorsed, in order to show the time of fifteen days, within which the land might be demanded by plevin. The demand of plevin was to be entered upon the roll in this manner: *Talis petiit per talem tali die terram suam per plevinam, quæ capta fuit in manum domini regis, per defaultam quam fecit versus talem, coram justitiariis nostris, tali die.* Upon this no writ issued, nor was anything done, except directing the party to keep the day given him in the writ of caption. If this plevin, and acceptance of the day, was done by the tenant himself, it seemed to preclude him from denying any summons on the

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<sup>1</sup> Bract., 365.

caption; if by attorney, it was still left open to him to deny both the first and second summons. The effect of the caption was not to deprive the tenant of the occupation and use of the land; for if so, it would be rather, says Bracton, a disseisin than a distress: should, therefore, a church become vacant in the meantime, the presentation belonged to the tenant.

After this demand *per plevinam*, the land was not immediately replevied to the tenant before he appeared, but it was first seen whether the demandant would proceed on the cause of action, or on the default: if the former, it was a relinquishment of the default, which immediately became null, and the land was replevied;<sup>1</sup> if the latter, it was not replevied till he had saved his default; in which if he failed, the seisin was adjudged to the demandant.

Upon the summons in the *magnum cape* the tenant was allowed no essoin, nor had he the *dies rationabilis*, as it was called, that is, the indulgence of fifteen days; because, being in contempt, he deserved, according to Bracton, no more favor than in case of a disseisin. The summoners were to come, if necessary, to testify the summons. At the return of the *magnum cape*, if the tenant appeared, and the demandant made choice of proceeding on the default, the tenant might deny the summons (and sometimes the essoins *de malo veniendi* and *de malo lecti*, if any); and if the summons was testified by the summoners on examination, he must wage his law thereof; and upon that another day would be given to make his law, and pledges likewise must be found. Upon the day appointed for making his law, an essoin lay for both parties.<sup>2</sup> If at length he made his law, he saved the default, but was obliged the same day to answer to the action, that no further delay might be had to the interval between waging and making law. If he failed in making his law, he lost, and the demandant recovered seisin of the land; further, the tenant, and, according to Bracton, the pledges likewise, were to be *in misericordia*.

If the tenant did not appear to the *magnum cape* on the first day, but on the second, third, or fourth, and the demandant came the first day and demanded judgment of both defaults, the tenant was required to defend both; un-

<sup>1</sup> Bract., 365 b.

<sup>2</sup> Ibid., 366.

less he had precluded himself, with respect to the latter, by demanding plevin in person, as before mentioned; for if both were not removed, he would continue in default. Should the default not be saved in some of the aforesaid ways, judgment would be given for the demandant to recover seisin of the land taken by the *magnum cape*; <sup>1</sup> upon which a writ of *seisinam habere facias* would issue to this effect: *Scias quòd A. in curiâ, etc., per considerationem curiæ recuperavit seisinam de tantâ terræ, etc., ut de jure suo, versus B. per defaultam ipsius B. Ideo tibi præcipimus quòd ipsi A. de prædictâ terrâ sine dilatione plenariam seisinam habere facias, etc.*

When the tenant had lost in this manner by default, there still remained a remedy for him; for he might recover in a writ of right at any time till the duel was waged, or the tenant had put himself on the great assize. Some thought it was open to him till the four knights were summoned; others, till the twelve were elected; but it was agreed, that no recovery could be had of land taken for default, after the twelve were elected. The tenant had a remedy likewise, if there had been any fraudulent contrivance in the demandant to prevent his being summoned; for when this was discovered, there would be neither a caption, nor judgment for a default; and if judgment was given, and anything done thereon, it should be revoked. The tenant might recover likewise, if judgment of seisin had passed while he was abroad, and he had not been prevented, as before mentioned, by the service of a summons. Bracton asks by what writ he should proceed in this last case; for neither the justices nor demandant had been guilty of any irregularity, as the summoners testified the summons to have been lawfully made. And he thought that the tenant might proceed by assize of novel disseisin; for he was in effect unjustly disseized, though by a judgment in court: and the demandant, says Bracton, in his answer to the assize,<sup>2</sup> might call upon the king's court to warrant him; and then the court, which had been so deceived, would revoke and vacate the process and judgment.

As the judgment of seisin might be vacated and revoked, so might the default be saved before such judgment was passed; and this in various ways.

<sup>1</sup> Bract., 366 b.

<sup>2</sup> Ibid., 367.



The principal of these was, the excuse which was before mentioned when we were speaking of essoins, namely, a warrant that he was in the king's service. This was signified by a writ to this effect. After reciting that he was in the king's service, it went on: *Ideo vobis mandamus, quodd propter absentiam suam ad diem illum coram vobis non ponatur in defaultam, nec in aliquo sit perdens, quia diem illam ei warrantizamus.* A person might be protected by such a writ, *de servitio regis* for a certain term, as from such a day to such a day; and they used to be obtained not only to save defaults in particular actions, but to save the default of appearance on any general summons, as that to appear before the justices at their eyre. As the king's service was a sufficient warrant to dispense with attendance in court; so was the being party to a suit in the superior court a sufficient excuse for not appearing in the county, court baron, or other inferior court, and a writ used to issue to warrant him in such absence.<sup>1</sup> The justices of the bench might send a writ to the justices itinerant, informing them that a party was attendant before them, and this would excuse his appearance in the eyre. The warrant *de servitio regis* could never be applied so as to enable the party making default to gain anything, but merely to indemnify him for a loss; nor could it suspend a judgment in any matter *contra pacem regis*, as outlawry or the like. The other grounds upon which a tenant might get judgment and execution revoked and vacated, were such as have been before stated as sufficient to save the default before judgment; such as imprisonment, being abroad before the summons, and other matters, which showed the absence to be not voluntary, but of necessity.

The warrant *de servitio regis* was liable to be controverted. It might be shown, that the party was at another place than that stated in the warrant; or, perhaps, even in court, but declining to enter an appearance at the time he was supposed by the writ to be *in servitio regis*. Bracton is of opinion, that such matter might be objected against the writ; though he admits, as on a former occasion, that if a representation was made to the king, and he persisted in continuing the warrant *de servitio*, there was no remedy.<sup>2</sup>

<sup>1</sup> Bract., 367 b.

<sup>2</sup> Ibid., 368. *Vide ante*, 193.

Before judgment of seisin, a default might be done away by certain acts of the demandant which were construed as an applied renunciation of the fault; as if he accepted a *dies amoris*, or removed the plea, or cast an essoin. When therefore he took a *dies amoris*, it was usually accompanied with a protestation, *quodd si amor se non capiat, salvus sit ei regressus ad defaultam*. A default might be released, either by a principal, an attorney, or a warrantor.<sup>1</sup>

Thus far of defaults committed by the tenant. The law was nearly the same as to the demandant. Thus, if he made default and the tenant appeared, and the writ came, notwithstanding the demandant might offer himself at the fourth day, the tenant would go quit, and the demandant would be *in misericordiâ*. The demandant had the same excuses, which we have just shown the tenant to have, to save his default. If neither the demandant nor writ came at the first day, and the tenant had essoined himself, then,<sup>2</sup> although there was no authority for proceeding, yet Bracton says, he should not be entirely absolved, but *dicatur ei quodd eat sicut venit*: the same, if the demandant came, and neither the writ nor tenant. But if the demandant and tenant both came, or either had essoined himself, and the writ did not come, yet *alius dies* should be given the parties, and the demandant, or his essoniator, would be commanded to cause the writ to be returned, as would likewise the sheriff. Again, if both parties were present, and the writ not returned, the tenant might demand the judgment of the court, whether he ought to answer without a writ; and then he would have judgment, *quodd quietus recedat de brevi illo*.

If the writ was against more than one tenant, and one appeared, one cast an essoin, and one made default, *alius dies* would be given to the two former; but the other was to be proceeded against by *cape*, taking, if he was one of several parceners, only his portion of the land. If the same default happened where the demandants were parceners, then a writ would issue against the defaulter, summoning him *ad sequendum cum B. et C. participibus suis in placito quod est inter A. B. C. petentes et D. etc., et unde idem D. dicit quodd non vult iisdem B. et C. respondere sine prædicto A. etc.* If

<sup>1</sup> Bract., 369.

<sup>2</sup> Ibid., 369 b.

the defaulter did not appear at the return of this writ, nevertheless *B.* and *C.* might proceed, as for their part, if they pleased.<sup>1</sup> If husband and wife were demandants, or tenants, they were not considered as *participes*, but the same person; and the default of one was the same as the default of both. If they were tenants, and the wife said her husband was dead, the judgment of seisin would be suspended, though she had no proof or *secta* to establish the fact; and a day would be given for the wife to prove the death, and the demandant the life; and it seems from Bracton, the mere dictum of the wife was, in this case, held sufficient to throw the *onus probandi* on the demandant.

We have before said, that upon a default, the caption of the land, or other thing in question, was either by *magnum cape* or *parvum cape*. It will be *Parvum cape.* proper to examine more particularly, when the one and when the other was the proper remedy. Bracton lays it down as a general rule, that in all cases where a person might deny a summons *per legem* (which he might before appearance), whether in the king's court, in the county, or court baron, there the caption should be by the *magnum cape*: the same, where on default to a writ of *pone* for removing a plea from the county to the king's court, though the tenant had in the county put himself on the great assize,<sup>2</sup> and the four knights had been summoned, if the tenant made default to the writ of *pone*: so upon a removal from the court baron to the county, on account of the lord having *de recto defecisse*: so when all the pleas *in banco* were put *sine die*, on account of the *iter justitiariorum*, and were again resummoned; and so in all cases of resummons, except in the resummons after a determination of bastardy in the ecclesiastical court, where the process was *parvum cape*; because there remained nothing further but judgment to be passed, which was not the case in the former instances, in all which the party might wage his law of non-summons.

If a person had once appeared in court, and had another day, so as that he could not deny the day and summons *per legem*, or if he had done anything that furnished a presumption of his having been summoned, as making an at-

<sup>1</sup> Bract., 370.

<sup>2</sup> Ibid., 370 b.

torney; in short, Bracton lays it down generally, that where a person had once appeared in court, and then made default, the caption should be by *parvum cape*.<sup>1</sup> The distinction when the one or other of these writs should be used, seems very extraordinary, as there is no difference in the forms given by Bracton; nor does there seem to be any in the effect. Indeed, the latter is spoken of very slightly by that writer: he barely says, if the party did not come on the first day of the summons, on the *parvum cape*, he should be expected till the fourth; and on the fourth, the seisin should be adjudged to the demandant; and the tenant should have such recovery *quale habere debebit*; as if he might recover in the same manner, as had been before mentioned in case of a *magnum cape*.<sup>2</sup> The whole of the learning which we have just been delivering respecting the *magnum cape* seems to have been equally applicable to the *parvum cape*.

We have been speaking of the process by caption, as the regular process in actions real: it was likewise used in some mixed actions; which were both *in rem* and *in personam*; where each party might be said to be *actor* and *reus*, though, in form of law, he alone was *actor* who brought the writ; as where the inheritance was divisible, either *ratione rei*, or *ratione personarum*, and one *particeps* brought a writ against another *pro rationabili parte*: so where land was *in communi* to persons who were not co-heirs, and one brought a writ for a division: so where a contest arose between neighbors for a boundary, and one brought a writ against the others *pro rationabilibus divisis*. For if in either of these three actions, or in any similar to them, a default happened, the process was the same as in real actions. But where two actions were contained in one writ, one being *in personam*, the other *in rem*; as where a person was summoned to show *quo warranto* he held such land, and then the writ went on and said, *Quam dominus rex clamat esse eschætam suam*; in this case, as there would arise an appearance of claim to two sorts of process, Bracton thought, contrary to the opinion of some others, he should have that which carried most compulsion, namely, the process real by caption. Sometimes these two matters used to be separated; and then upon the writ which con-

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<sup>1</sup> Bract., 371.

<sup>2</sup> Ibid., 371 b.

tained the *quo warranto*, or *quo jure*, the process was attachment, and not caption of the land.<sup>1</sup>

It may be here remarked, that by this simple writ of *quo warranto*, or *quo jure*, nothing could be recovered; for it was merely to call upon the Writ of *quo jure*. tenant to show by what title or warrant he held; and if he held by none at all, yet this gave no title to the demandant; but the demandant having made this discovery, must resort to another writ if he would recover the land.<sup>2</sup> This writ of *quo warranto*, or *quo jure*, by which a man might be called upon to show his title, enabled a litigious person to disturb the peace of any man's estate whenever he pleased. How far the party, so called upon, was required to disclose his title, does not appear. Bracton seems to speak as if it went no further than the title to possession, and the general point, whether by descent or purchase; and he seems to consider it as an ungracious and unhandsome proceeding. From the instance given by Bracton, it may be collected that this writ of discovery lay only for the king.<sup>3</sup> (a)

After the essoins, and other delay, or at the first day of the summons, in the writ of right, if the The count. parties both appeared, the demandant was to propound his *intentio*,<sup>4</sup> as it was called by Bracton, or *count*, and show the form in which he meant to contest his claim. For this purpose, after the writ was read, the demandant or his advocate, in the presence of the justices on the bench, was to declare himself to this effect: *Hoc ostendit vobis A. quodd B. injustè ei deforceat tantum terræ cum pertinentiis in tali villâ, et ideo injustè quodd quidam antecessor suus nomine C. fuit inde vestitus et seisitus in diminico suo, ut de fædo*

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(a) This is very remarkable. It was a proceeding in substance by way of discovery, or interrogatory, to ascertain the nature of the right on which the party relied, and that party *in possession*. Bracton, however, says: "Sed tamen quamvis incivile sit cogi possessorem titulum suæ possessionis dicere per breve quo jure tamen valet ad hoc, ut petens scire possit utrum tenens teneat pro hærede vel pro possessore: et pro hoc qua actione debet experiri, pro hærede autem possidet qui putat se hæredem esse: pro possessore vero qui nullo jure rem hæreditariam vel totam hæreditatem sciens ad se non pertinere possidet" (lib. v., fol. 373). So that it went only to the *general* nature of the tenant's title, whether he relied on title or possession, and if title, as heir or otherwise, it did not go into the particulars of his title.

<sup>1</sup> Bract., 372.

<sup>2</sup> Ibid., 372 b.

<sup>3</sup> Ibid.

<sup>4</sup> Bracton here borrows a term from the canon law, as Glanville did the term *petitio* from the civil, to signify the *count*.

*et in jure, tempore Henrici REGIS AVI DOMINI REGIS [or TEMPORE REGIS Ricardi avunculi domini REGIS, or TEMPORE JOHANNIS REGIS PATRIS domini REGIS, or TEMPORE HENRICI regis qui nunc est] capiendo inde expletia ad valentiam quinque solidorum, sicut in bladis, pratis, redditibus et aliis exitibus terræ; et de prædicto C. descendit jus TERRÆ ILLIUS, or as some expressed it DESCENDERE DEBUIIT cuidam D. ut filio et hæredi, et de prædicto D. cuidum E. ut filio et hæredi, et de prædicto E. isti A. qui nunc petit, ut filio et hæredi. Et quodd tale sit jus suum, offert disrationare per corpus talis liberi hominus sui, vel alio modo, sicut curia consideraverit.*

Certain parts of the *count* are worthy observation. Thus, we see, it was not sufficient barely to say, *peto tantam terram ut jus meum*, but this claim was to be grounded upon some suggestion that would demonstrate it, and show in what manner and by what degrees the *jus* ought to descend to the demandant. Again, as the object of a writ of right was to recover as well the *jus possessionis* as the *jus proprietatis*, upon the seisin of a certain ancestor, it was not enough to say that such ancestor was seized *in dominico suo, ut de libero tenemento*, only, but that he was seized *in dominico suo, ut de feodo*, which included in it the *liberum tenementum*, and whole *jus possessionis*: nor was it enough to say that he was seized *in dominico suo, ut de feodo*, without adding *et jure*, which included in it the *jus proprietatis*. Nor would the concurrence of these two rights, those of possession and propriety, called *droit droit*, suffice, unless the ancestor named held the land *in dominico suo*; for if<sup>1</sup> it was *in servitio* only, he would fail, the writ of right being for a recovery *in dominico*; for the demandant counted on the seisin of the ancestor; and therefore the same seisin must be recovered which the ancestor had. Again, it was not sufficient that the ancestor was seized *in dominico suo, ut de feodo et jure*, unless he added, that *expletia cepit*. For though a person may have a *liberum tenementum* and *feodum* without the *expletia* in a possessory action, as was before shown in the assize of novel disseisin and mortancestor; yet the seisin of the *proprietatis* was required not to be so momentary, but that there should be time to take the *expletia*; and therefore it was held, if there was no mention of *expletia*, the action would abate. Thus, if in fact no *expletia*

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<sup>1</sup> Bract., 372 b.

were taken, and the party had suffered the time of bringing an assize of novel disseisin or mortdauncestor to pass, and brought his writ of right, he would have no recovery.

Again, it was required that a certain time should be mentioned, that is, the time of some king, as *tempore talis regis*; for a writ of right, like other writs, had a time of limitation. Thus in the time of Glanville<sup>1</sup> it was not to exceed the time of Henry I., and now, by a late statute, it was not to exceed the time of Henry II., the present king's grandfather; the reason given for which was, that beyond that period no one could succeed in making a proof, whatsoever right he might have: for a demandant could not make proof, says Bracton, but *de visu proprio*, or that of his father, who enjoined him to testify the fact, if any contest should arise upon it: and if Bracton wrote towards the close of this reign, the above period of limitation was perhaps as far as this sort of proof could well reach. When, therefore, a demandant mentioned the time of Henry I., he would fail, for want of proof.

If his ancestor happened not to be seized in the time of the king mentioned in the writ, although he was seized in another king's reign, yet the demandant might perhaps fail through this error, the same as if he had never been seized at all. But the issue to be tried by the great assize being, which of the parties had most right; the king's time did not properly come within the consideration of the recognitors; and the right between the parties might be decided with justice in favor of the demandant, although he had failed in the time of seisin mentioned in his count: when, therefore, the demandant had put himself on the great assize, and the tenant had suspicion that the ancestor was not really seized at the time mentioned in the count; as perhaps he was not born, or was dead at the time; he used to pray that the time of seisin might be inquired of by the recognitors; and to obtain the favor of this extraordinary inquiry, it was the practice for the tenant to give something, *dare de suo*, as Bracton calls it: this being, probably, a remnant of the old custom of putting justice to sale; an abuse which was long permitted and made a gain of by our kings, and was at last provided against by a clause in the

Tender of the  
demi-mark.

<sup>1</sup> Vide vol. i., 477.

famous chapter of the Great Charter.<sup>1</sup> To prevent the tenant taking advantage of an error in mentioning the time, the demandant was permitted to correct it, and speak of the time of another king; and this was allowed in any state of the cause till the tenant had answered, and put himself on the great assize, or defended himself by duel; but not afterwards could the question of time be moved by the tenant.<sup>2</sup> The seisin was required to be *tempore pacis*; because, during wars, like those in the time of King John and the present king, many persons were violently disseized, and afterwards, in time of peace, were restored to their own property.

When the count was thus founded, the demandant was to offer to prove it, as was before mentioned; which offer was sometimes stated more fully: *Offert disrationare per corpus talis liberi hominis sui, et talis nomine, qui hoc paratus est disrationare per corpus suum, sicut ille qui hoc vidit, or de visu patris sui cui pater suus cum esset agens in extremis injunxit in fide quâ filius patri tenebatur, quodd si inde loqui audiret (as before mentioned) quodd inde testis esset; et hoc per corpus suum disrationare sicut illud quod pater suus vidit et audivit.* If any of the above circumstances were omitted, and the proceeding had gone too far to correct the error, the demandant would lose his claim for him and his heirs forever.

Another material part of the count was, the deducing the descent from the ancestor seized down to the demandant. This was plain and easy, when the descent was in

<sup>1</sup> *Vide ante*, p. 40. It is to be lamented that our author, who has opened to the modern reader so many secrets of our old jurisprudence, should be less explicit on a point that has caused much difficulty amongst lawyers. The tender of the demi-mark, as it was afterwards called, is the practice here noticed; but this is done so shortly as to throw no light upon it; and, unhappily, the passage is so obscured by the use of a word, and that a technical one, in two senses, that it is difficult to make out any meaning at all. Having used the word *mentio* to express the naming of the time of the seisin in the writ, he afterwards uses it to signify the moving the question of seisin by the tenant: *Dat aliquando tenens de suo pro habenda mentione de tempore.* Perhaps some reason might be given in those times, to show that the king might accept this tender of money for a judicial grace, without violating Magna Charta. This perhaps might be thought to stand on the same footing with the king's silver, which is still given *pro licentiâ concordandi*. The truth is, that the charter only aimed at flagrant and enormous partiality when obtained by corruption, and not at such trifling payments as were made and accepted of course from everybody, as a moderate recompense to the officers of the court for their labor and attendance.

<sup>2</sup> Bract., 373.



the right line; but when it was necessary to go over to the transverse, or collateral line, it became more difficult: then, instead of deducing it from father to son, a transition must be made in this way: *Et quia idem talis obiit sine hærede de se, revertebatur jus terræ illius tali ut avunculo et hæredi, etc.* And in this it was necessary to observe, that the *stipes* resorted to did not exceed the time of limitation before mentioned. If a son died in the lifetime of his father, it was the opinion of some that he need not be mentioned in the descent; but Bracton does not assent to this, laying it down as a reason, that no right descended to an heir from an ancestor, unless by the death of some heir; and he thought that such deceased heir should be noticed in this way: *Quodd de tali antecessore descendere debuit jus tali ut filio et hæredi, et de tali ei qui nunc petit<sup>1</sup> ut nepoti et hæredi;* so that no chasm would be left in the descent: for if that was allowed, then a son might be attainted of felony in his father's life, and, being left out of the computation of descent, the grandchildren would succeed immediately; which, as Bracton says, would be inconvenient, and against law. However, when the eldest son died in the life of his father, leaving no children, but leaving brothers, then it was not necessary to mention such eldest son in the computation of the descent, though the right ought to descend to him; as well because the other brothers were as near in degree to the seisin of the father as the brother who died, as because, upon his death, the eldest of the surviving brothers became next heir to the father; on which account the attainder of such elder brother, in the lifetime of the father, would not affect the other brothers, who were not heirs to him during the father's life.

Where an abbot, prior, or other incorporated person, sued a writ of right, in right of his church, grounded upon the seisin of a predecessor, there was no need to count from one abbot to another, naming the intermediate ones; because the corporation remained the same, notwithstanding the changes of the abbots.<sup>2</sup> They therefore only said, *talis abbas, predecessor suus, fuit seisitus, etc.* If land was given to more than one jointly, the parties should all be named in the computation of the descent, thus: *Et unde A. B. C. D. fuerunt seisiti, etc., et ita quodd tales mortui fuerunt sine hæ-*

<sup>1</sup> Bract., 374.<sup>2</sup> Ibid., 374 b. *Vide ante*, 184.

*rede de se, accreverunt eorum partes superstitibus, et ita quodd jus terræ illius descendit hæredibus eorum qui fuerunt superstites, scilicet talibus; et quia unus illorum, scilicet talis, obiit sine hærede de se descendit totum jus tali, et de tali illi qui nunc petit, etc.*

If any one was omitted in the descent; if it commenced with one who never was in seisin; if there was any error in the person, or the name of any one mentioned in the descent; if any of those mentioned in the descent was a villein; in all these cases, the action would abate, and the demandant lose his suit.<sup>1</sup>

When the count was thus exhibited, it became the tenant to consider what defence he could make. The  
Defence. first point to be considered was, whether the court had jurisdiction of the cause; next, whether the parties to the writ were proper; and then, whether the writ was liable to any exception. The next consideration was, whether the tenant held all the land demanded, or only part, and how much: to ascertain this, the tenant might pray *a view*. When this was over, then the tenant was to answer to the merits of the cause, either by himself or attorney, unless there was some *warrantor* whom he should like to *vouch*. The nature of vouching to warranty, and the answers the tenant might make, we shall defer for the present, till we have inquired a little into the method of praying and making *a view*, and the cases in which it was allowed.<sup>2</sup>

A view might be had either by the party or by the jurors.  
Of granting a view. Of the latter, something has already been said in the assize of novel disseisin. A view might be had also sometimes in inquisitions; and not only where it was a question for the recovery of property, but also where it was entirely upon a fact, as in cases of trespass. What we have now to say, will be confined to *a view* when prayed by the party, and granted for the purpose of enabling the court to pass a certain and precise judgment on the matter before them. In order to understand this, we shall first speak of cases where *a view* was not allowed, then of those where it was, and, lastly, of the manner of making it.

In a plea *de proparte sororum*, if the demand of the

<sup>1</sup> Bract., 375.

<sup>2</sup> Ibid., 376.

*rationabilis pars* was by a writ of *nuper obiit*, that is, by stating that the demand was of a certain portion of the inheritance, of which their common ancestor, *lately died seized*, the latter part of the allegation was construed to specify the parcel of land so accurately, as to supersede the necessity of a *view*; <sup>1</sup> but if land was demanded by a writ of right *ut de proparte*, then a *view* was allowed. For the same reason a *view* was denied in dower, if brought for land of which the husband *obiit nuper seisitus*. If a manor was demanded without the *pertinentia*, no view was allowed, a manor being sufficiently defined by the name only: so if the demand was of the moiety of a manor undivided; because the demandant being ignorant which moiety belonged to the tenant, could not inform him of the particulars on taking the view. But if it was divided, and the *pertinentia* were claimed, there a view would be granted; and, in any case, if the manor was undivided, he might have a view of the whole. A view was denied to an *intruder*, if the thing in which the intrusion was made was specified without the *pertinentia*; or if that was done, which was held to supersede the need of a view, as before mentioned, especially if the intrusion was so recent as within a year or less. If a woman demanded dower of a manor of which she was especially endowed, without naming the *pertinentia*, she could not have dower; so if she demanded *tertiam partem*, although she could not ascertain her third part, yet in this latter case, the tenant might have a view of the whole: however, if the woman replied that she demanded the third of that of which her husband *nuper obiit seisitus*, and that the tenant held the whole, no view would be allowed, for the reason above given. If the demand was made in an uncertain way, no view would be allowed, as demanding all the lands holden by the tenant in such a vill over and above ten acres: <sup>2</sup> though here, as in the former case, he might have a view of the whole. When a tenant had had a view, no warrantor whom he introduced into the action could have it; the warrantor knowing by his charter what land he was to warrant, without the assistance of a view.

If a view had been refused, or had not been prayed, yet when the duel was waged, and pledges given, the two

<sup>1</sup> Bract., 376 b.

<sup>2</sup> Ibid., 377.

champions might and ought to have a view, because, by law, they were to swear *de visu*; a day, therefore, used to be given them for that purpose. After land had been taken into the king's hands by default, it was not usual to allow a view, because the tenant, when he demanded it back *per plevinam*, must have ascertained it in the same manner as would be done by the demandant on a view, which, therefore, superseded the need of a view; however, for the same reason as was before given, the champions were to have a view after a default.

If the demand was made not of land, but of some right, as a right of advowson, of common, and the like, though these are invisible in themselves, yet as they are issuing out of land, the land to which they belonged might be ascertained either by view, or what amounted to a view. In cases of common it was sufficient if the place was viewed by the jurors; and so it was in trespass, and in waste; for in a personal action a view might not be prayed by the party.<sup>1</sup>

A view could be had in the following cases: of all lands demanded in a writ of right, or in any other writ in which the duel or the great assize might be had; in short, it lay wherever a corporeal thing was demanded that could not be otherwise ascertained, either directly by the naming of it without any *pertinentia*, or indirectly by a description, as in a *nuper obit* before mentioned, or by specifications that were adequate; as, *quam talis warrantizavit; talis tenet in eâdem villâ; talem quæ capta fuit in manus domini regis; talem quam talis tibi tradidit talem, de quâ disseisinam fecisti, talem quam tenes de dono talis*. It lay of incorporeal things, as in a writ of *quo warranto*, which writ, as has been before mentioned, was both *in rem* and *in personam*. It might be had of land out of which a rent issued, to which any one had common of pasture, or in respect of which suit of court was demanded. In all these cases, as well as the former, it might be had, unless the necessity was superseded by some sort of designation or description that was equivalent to it.<sup>2</sup>

If the view was granted, the entry on the roll was to this effect: *A. petit versus B. tantam terram cum pertinentiis, etc., etc. Et B. venit, et petit visum de terrâ, unde, etc.* And

<sup>1</sup> Bract., 378.

<sup>2</sup> Ibid., 378 b.

then there issued a writ to this effect, directed to the sheriff: *Præcipimus tibi, quodd sine dilatione habere facias B. visum de tantâ terrâ cum pertinentiis in N. quam A. in curiâ nostrâ coram justitiariis nostris apud W. clamat, ut jus suum, versus prædictum B. Et dic quatuor militibus, ex illis qui visui illi interfuerint, quodd sint coram iisdem justitiariis nostris apud Westmonasterium, tali die, etc., ad testificandum visumillum; et habeas ibi nomina militum, et hoc breve, etc.*, varying according to the form of the original writ,<sup>1</sup> and then *dies datus est eisdem, etc.* On the *dies datus*, the demandant and tenant might both cast essoins; but whether they came or not, the sheriff was to command the four knights to appear and testify their view; and when this was once done, the record of such testification must be abided by. If no view had been made, and the tenant appeared, and showed it, he might have another day. In making the view, the demandant ought to show to the tenant, in all ways possible, the thing in demand, with its metes and bounds.

If the tenant objected that the demandant had put in view more or less than what was contained in the writ, an inquisition of the country used to be made to find the truth.<sup>2</sup> This inquisition sometimes consisted of four, five, or six persons, whom the parties named, together with certain of those who had made the view. For this purpose the following special *venire facias* would issue: *Præcipimus quodd venire facias coram justitiariis nostris, etc., A. servientem talis, et ætornatum tuum, in loquelâ quæ est inter eundem A., etc., de tantâ terrâ, etc. Et similiter cum eo B. C. D. E. super quos prædicti tales se posuerant, et præterea quatuor ex illis qui visui interfuerint, quem prædictus A. attornatas petentis fecit tenenti de prato, etc., ad certificandum præfatis justitiariis quid et quantum prati, etc., idem attornatus posuit in visu, et unde idem tenens dicit quodd non posuit in visu, nisi tantum, etc.*

When the tenant was thus informed of the quantity of land which the demandant claimed, he was better able to calculate his defence, whether to take it on himself by pleading any exception, or, if he had any warranty, to vouch a warrantor to defend for him.<sup>3</sup>

If the tenant had no good cause of exception, either dilatory or peremptory, and had any one to vouch, it would be safer to vouch his warrantor

Vouching to  
warranty.

<sup>1</sup> Bract., 379.

<sup>2</sup> Ibid., 379 b.

<sup>3</sup> Ibid., 380.

to defend for him. This was to be done by the aid of the court, or not, according as the warrantor was, or was not, within the power of the tenant.<sup>1</sup> A clause of warranty was usually inserted in every charter, whether made on the occasion of a donation, a sale, or exchange of any land or tenement; sometimes a warranty arose by reason of homage, without any charter at all. As a warranty was usually made for the warrantor and his heirs, to the donee and his heirs, the mutual tie continued on the heirs *in infinitum* on both sides; so it did on the assigns, and those who were *in loco hæredum*, as the chief lord, who came into seisin by reason of escheat.<sup>2</sup> A tenant for life, as well as one in fee, and even one who held for term of years, might either vouch or be vouched. A husband might vouch his wife; and, in case of a gift made by her to him before marriage, if he lost, she was bound *in excambium*: the same if the wife was impleaded of land given to her before marriage by the husband.<sup>3</sup>

If a minor was vouched, the tenant was expected, at the time of vouching, to show the deed containing the warranty. This was to take off the suspicion of its being meant for delay, the vouching of minors being often resorted to for no other purpose than that of delay. When the charter was shown, and the question was upon a service, it was inquired, whether the minor's father, or any of his ancestors, was seized of the service *anno et die quo fuit vivus et mortuus*: if he was, then the minor was immediately to enter into the warranty, but the plea between the demandant and him was to remain *sine die* till he was of age; for he was not obliged to answer, either to the warranty or the plea, till he was of age. But if the tenant had been enfeoffed of the land in question during the minority, the minor was to answer both to the warranty and the plea; and in order to know this, an inquisition would be made, whether it was an inheritance by descent or by purchase. What is said above of services applied also to homage.<sup>4</sup>

The obligation of warranty that arose from homage might, as was before said, be proved without a deed. If the vouchee called for one, the tenant need only say, "You are bound to warranty, because

<sup>1</sup> Bract., 380.<sup>2</sup> Ibid., 380 b.<sup>3</sup> Ibid., 381.<sup>4</sup> Ibid., 381 b.

*ego sum inde homo tuus*, and you have received my homage for this land, and are in seisin of my service, and my father and his ancestors *inde fuerunt homines antecessorum tuorum* ;” of which he was to produce a sufficient *secta*, or some one who was ready, if necessary, to prove it *per corpus suum* ; and if, upon the denial of the vouchee, this was afterwards proved before the justices, they would adjudge him to enter into the warranty. Although the tenant might at any time make the surrender of his tenement, yet the lord could not waive the homage, because by such means he might, at the expense of a small service, deprive the tenant of the claim of warranty, which depended upon the doing of homage. If the warranty was grounded on a fine and cyrographum, it is made a doubt by Bracton, whether a minor should not be bound to answer, though his ancestor was not seized *die et anno*, as above mentioned. But of this more hereafter.

A warranty was sometimes conceived so as to bind not only the person of the feoffor, but also a certain tenement. Thus in the deed of gift he might say, that he and his heirs would warrant the gift *ex tali tenemento quod tunc tenet*, to whomsoever that tenement might afterwards come ; by virtue of which special warranty that tenement, in whatsoever hands, would be liable to go *in excambium* of the land warranted. But the law was so favorable to warranty, that, without such express specification, land was held to be tacitly bound by warranty ; and therefore, if a warrantor at the time of making his warranty<sup>1</sup> had sufficient to make good his warranty, the land he then had became bound by the warranty ; and even if it went into the hands of the chief lord, or of the king, by escheat, Bracton holds<sup>2</sup> it to be liable to the warranty, *quia res cum onere transit ad quemcunque*.

The king, in point of law, was liable to warrant, the same as a common person ; but he could not be vouched, because no summons could issue against him ; instead, therefore, of vouching, the tenant ought to say, in the style of a remonstrance, that *sine rege respondere non potest, eò quòd habet chartam suam de donatione, per quam si amitteret, rex ei teneretur ad excambium*. It seems that such respect was paid to the king's charter, that an allegation thereof

<sup>1</sup> *Satis habuit*.

<sup>2</sup> Bract., 382.

was held sufficient cause to delay the proceeding. To remedy this, it had been lately provided, that the king should never be named in this way, unless where he was bound *ad excambium*.<sup>1</sup>

In vouching, the tenant ought to name the warrantor with all possible precision. Thus, if he was son as well as heir, he should be called son and heir. If many claimed to be heirs, they should be vouched disjunctively, *talis vel talis*, whoever of them was heir. If the heir was *in ventre*, and the wife had prayed to be put into possession *nomine ventris*, as seems to have been usual, then the tenant was at liberty either to name the person who was apparent heir, or him *in ventre*, stating in all such cases the special ground of ambiguity.<sup>2</sup>

If a person was vouched who was in the power of the tenant, as a wife, children, or others under his authority, the tenant was not to have the assistance of the court; but if he did not produce the vouchee, he was to lose his land. If the vouchee was not in the realm, he was not within the reach of the king's writ, and therefore it would be in vain to pray the assistance of the court; and if the tenant did not produce such warrantor, he would lose his land: but if the person vouched was in Ireland, the king's writ used to issue to the justices there.<sup>3</sup> If the vouchee resided within the power of the king's writ, and he could not be produced without the court's assistance, then there issued a writ to this effect, addressed to the sheriff: *Summoneas per bonos summonitores A. quòd sit coram justitiariis nostris, etc., tali die ad warrantizandum B. tantum terræ cum pertinentiis in tali villâ quam E. in eâdem curiâ coram iisdem justitiariis, etc., clamat ut jus suum versus prædictum B. et unde idem B. in eâdem curiâ nostrâ coram iisdem justitiariis nostris vocant ipsum A. ad warrantizandum versus prædictum E., etc.*

The writ of summons *ad warrantizandum* always made mention of the sort of plea depending. If the warrantor was a minor, there was a writ of summons to the guardian to appear, and bring with him the heir. If an heir was vouched in respect of his mother's land, which was

<sup>1</sup> This provision is said by Bracton to be made *coram ipso rege in dedicatione abbathie de Hayles in præsentia novem episcoporum, et coram comite Richardo et aliis pluribus comitibus*. This, therefore, was an act of the legislature, and is one of those many acts of parliament which are now lost. The date of this provision is not mentioned.

<sup>2</sup> Bract., 382.

<sup>3</sup> Ibid., 395 b.



then in possession of his father as tenant *per legem Angliæ*, the warranty was not deferred, but a writ issued to him, expressed either to hear the judgment of the court on the warranty, or to warrant together with the heir.<sup>1</sup>

At the return of the summons, the demandant, tenant, and warrantor, might all essoin themselves. If the demandant made default, and the tenant appeared, the tenant had judgment to go quit; if the tenant, then there was a *capiatur in manus domini regis*, as in common cases. If the demandant and tenant both appeared, and the warrantor made default, then a writ of *capias ad valentiam* issued to take as much land of the warrantor as was equal to the value of the land in question. If the land of the warrantor was in another county, the sheriff of that county could not judge of the value of the land in question; to ascertain this, therefore, a writ first issued to the sheriff of the first county, commanding him by the oaths of twelve men of the vicinage *quod extendi faciat, et appretiari*, the land in question; upon the return of which extent, they grounded a writ of *cape ad valentiam* to the sheriff in the foreign county.<sup>2</sup> If a guardian made default, the *cape ad valentiam* issued against the lands of the minor: if either the tenant *per legem Angliæ* or the heir made default, the *cape ad valentiam* went against the maternal inheritance in the possession of the tenant *per legem*. If there was more than one warrantor, as in the case of parceners, the *cape ad valentiam* issued against all rateably, though if some appeared, they did not suffer by the default of the others, who were proceeded against separately.<sup>3</sup>

The writ of *cape ad valentiam* contained in it likewise a summons; and if the warrantor after the caption did not appear to this summons neither the first, second, third, nor fourth day, and the demandant and tenant both appeared, the former against the latter, and the latter against the warrantor, then judgment was given that the demandant should recover<sup>4</sup> the land against the tenant, by default of the tenant, and the tenant an *excambium ad valentiam* out of the land of the warrantor. Upon this there issued a writ for the demandant, commanding the sheriff *quodd habere facias seisinam*, and another for the tenant *de*

<sup>1</sup> Bract., 383 b.

<sup>2</sup> Ibid., 384.

<sup>3</sup> Ibid., 385.

<sup>4</sup> *Recuperat terram suam versus B. per defaultam B. et B. in misericordia, et habeat de terra ipsius C. in loco competentis excambium ad valentiam.*

*excambio* against the warrantor,<sup>1</sup> which latter was preceded by a writ of extent, if the land was in another county, as in the case of the *cape ad valentiam* before mentioned. If the warrantor had appeared, and afterwards made default, then there issued a *cape ad valentiam*, which was a *parum cape*; and if he<sup>2</sup> failed to appear to the summons therein contained, the demandant had judgment against the tenant by default, and the tenant *ad valentiam* against the warrantor, as in the former case: and so of the person or persons making default, if the warrantor was more than one person; though if husband and wife were summoned, and one made default, it was the same as if both had so done, whether before appearance or after. If the warrantor afterwards appeared, but had no sufficient excuse to save his default in not appearing at the first, second, third, or fourth day, then, in like manner as in the former cases, the demandant had judgment against the tenant, and the tenant over against the warrantor for an *excambium ad valentiam*, upon which issued writs of *habere facias seisinam* for both parties.<sup>3</sup>

If the demandant and warrantor appeared and offered themselves, and the tenant was absent, then, if he had not entered into the warranty, he *statim recedat quietus de warrantia*, and a *parvum cape* would issue for the land in question, and if upon the return thereof the tenant did not appear or could not save his default he would lose his seisin. If the demandant made default, and the tenant and warrantor appeared and offered themselves, they both *recedant quieti de brevi illo*. When a person was vouched who had no land in fee that might be taken into the king's hands or by which he might be distrained, then a writ issued to the sheriff,<sup>4</sup> *quodd habeat corpus*, to take the body.

When the demandant, tenant, and warrantor all appeared in court, the warrantor either entered into the warranty or contended that he was not bound to warrant. If he voluntarily did the former, the original suit then proceeded between the demandant and warrantor, and the tenant might leave the court till the plea between them was determined. The demandant was therefore to propound his count to the warrantor, in the same manner as he before had to the tenant, to which he was to answer,

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<sup>1</sup> Bract., 387 b.<sup>2</sup> Ibid., 386.<sup>3</sup> Ibid., 386 b.<sup>4</sup> Ibid., 387.

and defend the demandant's right by the duel or great assize, unless he could plead some exception or had a warrantor, whom he in his turn might call to defend him, and thus they might go on, one warrantor vouching another till none was left to be vouched; and if the last warrantor lost, either by default or by judgment, he would be liable *ad excambium*, and so on from hand to hand to the tenant.

If the warrantors were *C. D.* and *E.*, and *E.* had nothing wherewith an *excambium* could be made, and all the others had sufficient, Bracton thought it hard that the tenant should go without an *excambium*; and therefore, in his opinion, it appeared equitable that *D.* should, notwithstanding, recompense *C.* and wait for better times, when *E.* could do the same by him, so that the writ of seisin would run: *Et quia E. nihil habet unde excambium facere possit ipsi D., ideo de terris ipsius D. in ballivâ tuâ eidem C., excambium ad valentiam prædictæ, terræ, sine dilatione habere facias, donec idem E., aliquid habeat unde excambium facere potest, et illud idem excambium sine dilatione habere facias prædicto B., etc.* The same was also done if any of the intermediate warrantors were unable to make an *excambium*. If the last warrantor could satisfy only in part, the remainder was to be supplied by the intermediate warrantors, observing the order in which they were vouched.

If a person had infeoffed several at different times, and was vouched by them all, and lost, without having sufficient to make an *excambium* to each, they were to be satisfied according to the priority of their feoffment. This is supposing that judgments were given in all the pleas in one day, for if they were at different times, those who had the first judgment should be preferred, and if they exhausted the property of the warrantor, those who came after, says Bracton,<sup>1</sup> must wait for better times, for the warrantor, if he had nothing, was not therefore discharged; but anything which might afterwards come to him by descent from the ancestor by reason of whose warranty he was vouched, would be liable to be taken *in excambium*.

Should the person vouched, instead of entering voluntarily into the warranty, contend that he was not liable to be called upon, it lay with the tenant to make out the title by which he vouched.

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<sup>1</sup> Bract., 388.

The grounds upon which warranty might be founded have already been considered in part; to those may be added the following: One great ground of warranty was a common gift of land by the words *do* or *dedi*; for it is laid down by Bracton, that in all charters *de simplici donatione*, the tenant was entitled to a warranty from the donor and his heirs, unless some clause was inserted specially declaring that the donor or his heirs should not be bound to warranty or to make an *excambium*. A charter of confirmation, if it contained the word *do*, as it usually did, *do et confirmo*, in like manner bound to warranty, because it was in effect a *simplex donatio*, as well as a confirmation.<sup>1</sup>

Many were the exceptions which might be stated by the person vouched to show he was not bound to warrant. In the first place, he might avail himself of any error in the writ of warranty, but he could not have a view. If the warranty was grounded upon a charter, he might show that the charter had such defects as to be of no validity in law, of which more will be said hereafter. If no exception lay to the charter, he might except to the gift. Thus he might say, that the donee had not seisin in the life of the donor,<sup>2</sup> that the donor was never seized, that the tenant was not heir to the feoffee, that he was not such an heir as is described in the original gift, that he was one of those persons who were expressly excepted in the warranty.

A warranty was with reason held not to bind a person to defend the feoffee against the feoffee's own tenant, but only against strangers who might claim any right before the first feoffment. If a person had recovered an *excambium*, where he had lost upon an act of his own, and had no lawful title to recover against his feoffor, as in the foregoing case, the feoffor had a special writ to obtain restitution of the land so wrongfully recovered.<sup>3</sup> Where a warranty was extended to the heirs and assigns, the assigns had an option, whether they would vouch the feoffee or the first feoffor.<sup>4</sup>

If the warrantor happened to die, the principal action

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<sup>1</sup> Sometimes there was a special charter, expressing that the donor, notwithstanding the homage, should not be bound to warranty, or to make *excambium*.

<sup>2</sup> Bract., 390.

<sup>3</sup> Ibid., 391 b.

<sup>4</sup> Ibid., 391.

was not abated, as it was by the death of either the demandant or tenant, but the warranty was suspended for a time, as in the case of a minor. We have before seen, that where the ancestor died seized in fee, the minor was bound to answer the warranty; and Bracton lays it down positively, that if in support of the warranty the tenant produced a cyrographum or fine made by the warrantor to the tenant, the warrantor was obliged to answer, though a minor, although he need not answer if it was grounded on a common charter, on homage, or on service done. But yet, as to the demandant, he should have his privilege not to answer till he was of age, unless, indeed, where his ancestor did not die seized in fee.<sup>1</sup> If the warrantor died at any time before judgment passed between him and the demandant, the plea did not abate, but the heir of the warrantor, whether a minor or not, was to be vouched; and if the warrantor had lost by judgment, but had not made an *excambium* and died, the heir was to make the *excambium* without any other writ being sued.<sup>2</sup>

There were instances where a person might enter into a warranty though he was not vouched. This was not in defence of the tenant's right, but of his own, as if a person was tenant for life or in dower of land which was to revert to the tenant in fee, and the tenant in fee perceived that such tenant permitted himself to be impleaded, and omitted to vouch the tenant in fee to defend: in such case, the reversioner, seeing the danger his title was in, might appear unvouched, and enter into the warranty to defend his own right. It was considered as the duty of every tenant for life, if impleaded for the land he held, to vouch his warrantor to defend.<sup>3</sup>

When the person vouched, after contesting the point, was adjudged to enter into the warranty, the demandant was to recommence the principal action against him, propounding his count as against the tenant, with the additions which the change of persons and circumstances required; as, *quodd injustè intrat in warrantiam, quia terra de quâ agitur est jus suum, quia talis antecessor suus, etc.* The plea therefore went on between the demandant and warrantor, and this was the time for the warrantor to vouch over any person to warrant him, upon which a summons

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<sup>1</sup> Bract., 392.<sup>2</sup> Ibid., 392 b.<sup>3</sup> Ibid., 393 b.

*ad warrantizandum* would issue similar to that before mentioned. If he had none to vouch, or chose to vouch none, then he either defended the right and seisin of the demandant *per corpus liberi hominis*, or put himself upon the great assize, unless he had any exception to plead. Of these, some were common both to the tenant and warrantor, some belonged only to the tenant, and some only to the warrantor. No exceptions that had been made by the tenant and overruled, nor any which he had waived, could be pleaded by the warrantor.<sup>1</sup> If the warrantor succeeded either in his defence *per duellum* or by the great assize, or in any exception he proposed, the tenant remained in his seisin, and the demandant was in *miserericordiâ*; if he failed in either, the tenant lost his seisin, and the warrantor, as before mentioned, was bound *ad excambium*.

Respecting the *excambium*, or recompense in value, it is clearly and repeatedly laid down by Bracton, that no more could be demanded than the warrantor possessed by descent from the original warrantor, so that property *ex parte maternâ* was not liable to make good a warranty *ex parte paternâ*, and *vice versâ*. In no case was land taken by purchase at all liable,<sup>2</sup> nor was a person bound to warranty beyond the value of the land at the time of the donation. Judgment for the *excambium* with the writ of seisin, and, where necessary, that of extent, have already been considered.

Before we dismiss the subject of warranty, it will be proper to consider two points which were very intimately connected with it; these are the manner of proving a charter, and of proceeding by *warrantia chartæ*. If a charter was produced, and the person vouched denied the writing, the seal, and the gift, then the person producing it might maintain the gift to be lawful, and the charter to be valid; and, *inde ponit se super patriam, et testes in chartâ nominatos*. Upon this, a writ issued to the sheriff, commanding him to summon *A. B. C. testes in chartâ nominatos quam D. in curiâ nostrâ coram justitiariis nostris profert, etc., et præterea duodecim tam milites quam alios legales, etc., ad recognoscendum super sacramentum suum, si prædictus, etc.*<sup>3</sup> If the witnesses lived in different

<sup>1</sup> Bract., 394.<sup>2</sup> Ibid., 394 b.<sup>3</sup> Ibid., 396.

counties, different writs issued, but the *milites* always came from the county where the land lay.

Suppose the writing and seal were admitted, but the validity of the charter was questioned, because made while the donor was *non sanæ mentis*, or under age; or because extorted from him by force and fear while under restraint; or because obtained through deceit, being a feoffment in fee, when a term only was intended to be granted; in all these cases it lay upon the person producing the charter to prove the contrary. Sometimes the inquisition was made by the witnesses alone, and sometimes by strangers without the witnesses, according as the parties chose.<sup>1</sup> In the latter cases, there was always a clause in the writ directing that they should view the land. Some of these inquisitions were to be taken before the justices of the court where the suit depended, some before the sheriff and the *custodes placitorum coronæ*. If the witnesses and recognitors did not appear in court at the day, another writ issued to the sheriff, beginning thus: *Bene recolimus ALIAS tibi præcipisse quodd, etc.*, and concluding with this injunction and caution: *Et ita te habeas in hoc negotio, ne nos ad te graviter capere debeamus.*<sup>2</sup> The writ of *venire* always stated the issue which was to be tried, and was, therefore, as various as the matter which might become the subject of such inquiry.

When the witnesses and recognitors appeared in court, the witnesses having taken their oath, declared that they were present when the gift was made, and that the charter of donation was read and heard, homage accepted, and seisin lawfully given to the donee in their presence, with all due solemnity. Upon this the charter was pronounced to be valid, and the gift good in law. If they said they had only heard that such a charter was made, and homage accepted, but were actually present when seisin was given and the donee entered, this also was held sufficient to prove the gift good: and if they said they were present at all the other circumstances, but they knew nothing of the seisin, then the charter was proved, but the gift was invalid. If, says Bracton, the witnesses said they were present at the making of a note or memorandum to which both parties assented, this was held suffi-

<sup>1</sup> Bract., 396 b.

<sup>2</sup> Ibid., 397 b.

cient to prove the charter, though they were not present at the writing or signing of it.

If all the witnesses were dead, or out of the realm, so that none appeared to give testimony to the truth of the charter, then, of necessity, as in other cases, recourse must be had *ad patriam*.<sup>1</sup>

Yet Bracton says, that a charter might be proved in other ways than *per testes et per patriam*. The seal might be compared with another seal of the same person, which had been produced and proved in court, or acknowledged by him. If, upon comparison of the seals, there appeared an agreement between them, this amounted to a proof of the deed, unless the charter carried upon the face of it some circumstances of manifest suspicion; as rasure in any part which contained the fact of the charter; for as to that which contained the law of it, that, as in writs, was not so material; for *jura*, says Bracton, *ubiq; scribi possunt*. A diversity of hands, or of ink, raised only slight presumptions that might be done away by the testimony of the witness or the country.<sup>2</sup>

The proceeding by *warrantia chartæ* was this: If a man was distrained by the chief lord to do greater services than were expressed in the charter of donation; this not being a plea concerning the right of the land itself, he could not have any remedy by vouching his warrantor, but he might summon him by the following writ: *Præcipe tali quod sine dilatione WARRANTIZET tali tantum terræ, etc., quam tenet, et de eo tenere clamat, et unde CHARTAM suam habet, ut dicit. Et nisi fecerit, et talis fecerit te securum de clamore, etc.* Upon this there lay one essoin; and if he neither appeared nor essoined himself, there followed the process of attachment, the course of which will be particularly mentioned hereafter. When he appeared, he might contest the warranty, in the like manner as in case of a voucher. The above writ was the usual remedy where the tenant was vexed by the superior lord, who was paramount the warrantor; but where the warrantor exacted services, against the tenor of his own charter and warranty; some thought that a writ of *warrantia chartæ*, being for an injury, was not a proper remedy against his own lord, but that the proper remedy was by

<sup>1</sup> Bract., 498.

<sup>2</sup> Ibid., 498 b.



the writ *de recto de servitiis et consuetudinibus*, which would lead to the duel or great assize: however, according to the opinion of Bracton, this action *de injuriâ* was the proper course against one who had attempted to oppress and destroy the person whom he was bound by his own solemn engagement of warranty to defend.<sup>1</sup>

Perhaps the tenant had no person whom he could vouch to warranty; or he might decline vouching, and would rather put in his exception or plea, stating such matter as would either defeat or suspend the demandant's action. The different exceptions that might be alleged by a tenant are discussed at length by Bracton, from whom may be collected a short system of pleading, as understood and practised in his time.

Pleas, or exceptions, as Bracton terms them, were of two kinds, dilatory and peremptory. Again, of dilatory pleas, some were peremptory as to the jurisdiction, but only dilatory as to the action. The order <sup>Of exceptions.</sup> of stating exceptions, or of pleading, was first to the jurisdiction, next to the person of the plaintiff, then to the person of the defendant, next to the writ.<sup>2</sup> Yet Bracton says, that some lawyers did not adhere to this order, but thought that they might plead a latter plea first, and with a protestation save the benefit of a former, which they might plead afterwards, if necessary. It was agreed, however, that a defendant might plead more than one dilatory plea; but he could plead only one that was peremptory as to the action. A plea might be proved many ways, by an instrument, *per patriam*, or by an inquisition, says Bracton, consisting of impartial unsuspected persons, being neither acquaintance<sup>3</sup> nor domestics of the party; for which reason it could not be proved by a *secta*, which might consist of the party's acquaintance or domestics; and on that account a *secta* was never esteemed as a proof, but only as inducing a slight presumption, which might be done away by a proof to the contrary, and by a defence *per legem*.<sup>4</sup>

Jurisdiction, or the authority of deciding between the parties to the suit, depended in general upon the maxim of the civil law, that *actor sequitur forum rei*; but this was controlled by a variety of exceptions (a). Thus matters

(a) The author hardly does justice either to the subject or the authority he follows. In the age in which Bracton wrote, between the great struggles

<sup>1</sup> Bract., 499. <sup>2</sup> Ibid., 399. <sup>3</sup> *Familiares et domestici*. <sup>4</sup> Bract., 400 b.

relating to matrimony and testaments belonged to the spiritual court; matters of freehold and crime belonged to

under Henry II. and the great era of anti-ecclesiastic legislation, which commenced with the reign of Edward III., the subject of the distinction between the spiritual and secular jurisdictions was of immense importance. And to those who desire to form a judgment upon the events of those times, it is essential to have a clear idea of the principles then admitted. Bracton expounds the subject thus, and it must be borne in mind that he was a king's justiciary, and not likely to err in favor of ecclesiastical views. "*Est etiam jurisdictio quæ pertinet ad sacerdotium et forum ecclesiasticum sicut in causis spiritualibus, et spiritualitati annexis: Est etiam alia jurisdictio quæ pertinet ad coronam et dignitatem regis ut regnum in causis et placitis temporalium in foro seculari; et unde videndum cujus iudicium, et forum acta adire debeat. Et licet generaliter verum sit quod actor forum rei sequi debeat, fallit tamen in casibus propter diversitatem jurisdictionum et causarum de rebus spiritualibus et temporalibus, et earum sequela sicut in causa matrimoniale, et rebus præmissis ab causam matrimonii: quæ in foro ecclesiastico termenari debent: quia cujus juris, i. e., jurisdictionis, est principale, ejusdem juris erit accessorium.* Et eodem modo sicut si in foro seculari agatur de aliquo placito quod pertineat et coronam et dignitatem regis et fides appositæ in contractu, non propter hoc pertinebit cognitio super principale ad iudicem ecclesiasticum" (f. 401). Now, here the principle laid down is that the accessory follows the forum of the principal, which is clear and intelligible; and according to that principle, when a question arose as to patronage or endowments of ecclesiastical benefices, the jurisdiction ought to belong to the ecclesiastical courts, for surely the ecclesiastical cures and dignities were in such cases the "principal," and the endowments or the right of patronage, accessories. But Bracton, with ingenious, yet obvious sophistry, suggests that wherever the question was as to the "crown and dignity" of the king — (as, of course, it was always pretended to be) — in other words, that wherever the crown made a claim, then the jurisdiction must belong to the king's courts, according to which the king's courts would have jurisdiction wherever the crown made a claim. Now, the crown made a claim wherever there was any temporality annexed to a spirituality, so that wherever there was a temporality annexed to a spirituality, the crown, according to this, would have jurisdiction. Yet Bracton, in the commencement of the passage, says, that the ecclesiastical courts have jurisdiction in cases of spiritualities or of things annexed to spiritualities, which clearly appears to cover endowments which are annexed to spiritualities and patronage which is a right incident to endowment. According to Glanville, we have seen, where the question was between patron and clerk, the jurisdiction was in the ecclesiastical courts. Bracton, however, allows the ecclesiastical courts only jurisdiction over mere spiritualities. "*Quia clericus in nullo conveniendus est coram iudice seculari quod pertinet ad forum ecclesiasticum, sicut in causis spiritualibus; et spiritualibus annexis, ut si pro peccato vel transgressione fuerit pœnitentia injungenda, et quo causa iudex ecclesiasticus habet cognationem, quia non pertinet ad regem injungere pœnitentias: nec ad iudicem secularem nec etiam adeos pertinet cognoscere de eis quæ sunt spiritualibus annexa, sicut de decimis et aliis ecclesiæ proventionibus. Item nec de catullus que sunt de testamento vel matrimonio. Item nec de pecunio promissa ab causam matrimonii quæ est sequela matrimonii ut superius dictum est: et hujusmodi quia iudex ecclesiasticus in eis omnibus habet jus revocandi donum et quamvis in omnibus aliis actionibus sive placitis ad forum seculare pertinentibus videatur quod clericos sequi debeat forum seculare, sicut in actione injuriarum vel criminis dum tamen civiliter agatur,*" etc. He goes on, "non est

the king's courts. It was no uncommon thing in these times, as has been shown before, for a person to bind himself specially to be amenable to a certain court, or such court as the plaintiff should please to sue in. This was a voluntary renunciation of jurisdiction that was binding on the party so contracting.

We have already seen the controversy which was maintained by the clergy in favor of the spiritual jurisdiction; and it seems, that in the time of Bracton many had no scruple to contend, that clerks were not bound to answer before a secular judge in any plea whatsoever, whether of freehold, contract, or crime; but that venerable author, who has been so unjustly accused of a prepossession in favor of the civil and canon law, declares it as his opinion (a), in opposition to such notions, that they were amenable

laicus conveniendus coram iudice ecclesiastico de aliquo quod pertineat ad coronam et Regium dignitatem et ad regnum, sicut nec de laico feodo, vel eis pertinentiis ratione prædicta, ut si jura pertineant, sicut advocatio jus pascende," etc. So, according to this, an advowson or right of presentation to a spiritual living was as much an accessory to property as a right of common for cows. This is how the king's justiciary arrives at and applies his principle, that the accessory follows the principal, and that to the ecclesiastical courts pertain jurisdiction over things annexed to spiritualities!

(a) The author hardly represents the real effect of what Bracton says, nor, indeed, quoted him correctly, and the real effect of what he says is to show that upon his own principles he was wrong. He says: "*Quamvis sunt qui dicant quod de nullo placito tenentur respondere, nec ratione rei contractus, vel delicti, coram iudice seculari et, (sic loce pace eorum) videtur, quod fit in omnibus actionibus et placitis civibus et criminalibus præter quam in executione iudici in causa criminali ubi laici condemnandus esset ad amissionem vite vel membrorum, et qui casu quamvis iudex secularis habet cognitionem ut cognoscat de crimine tamen non habet potestatem exequendi iudicium, sicut in causis civilibus, non enim possit degradare clericum magis quam ad ordines promovere, et ideo propter ejus defectus habet ordinariis executionem iudicii, licet aliter observatur quod in causa criminali ubi poena capitalis infligenda est, habet ordinarius ut ramque, videlicet cognitionem et iudicii executionem*" (*Bracton*, lib. v., c. ii., s. 5). Now, here it will be observed, Bracton admits that the cleric could not be touched in life or limb until he was degraded, and that the lay tribunals could not degrade him. The natural inference from this would be that the lay tribunals should not try cases where they had no legal power to execute their sentences, especially as he admits that the ecclesiastical judges had power both to take cognizance of the case and to execute sentences, though not, indeed, to inflict any capital sentences. The passage, however, which our author refers to at the end of the above passage, in the text is: "*Super crimine iudex ecclesiasticus non habebit jurisdictionem licet habere debeat iudicii executionem,*" — which involves another inconsistency, that a judge should execute the sentence of a tribunal of a totally different forum, proceeding upon rules and principles antagonistic to his own. "*Pertinent igitur (ut videtur) ad iudicem secularem cognitio, et ad iudicem ecclesiasticam iudicii executio, quia iudex secularis degradare non potest.*" So the bishops were to execute the sentences of the

in all pleas civil or criminal, except only in the inflicting of a criminal sentence which affected life and limb; for there, though the secular judge had the cognizance, the execution was to be in the ordinary. Yet, as is observed by Bracton with some indignation, the practice was otherwise; for in capital offences the ordinary used to assume the cognizance as well as the execution,<sup>1</sup> notwithstanding he was bound by the canons not to judge in matters of blood.<sup>2</sup>

When a suit was commenced in the spiritual court for a matter which was properly cognizable at common law, the party so wrongfully sued might, as we have already seen, have a writ of prohibition to restrain the judge and party from proceeding further; the boundary, therefore, of these two jurisdictions is to be ascertained by a knowledge of the cases in which writs of prohibition were or were not allowed. This point was but slightly touched by Glanville, who confines what he says entirely to one or two writs;<sup>3</sup> but the subject of prohibitions is treated very fully by Bracton (*a*).

lay courts. He elsewhere says, however, that clerks were to be delivered to their ordinaries before trial: "*Cum vero clericus captus fuerit pro crimine, et decapitatur curia Christianitatis ab ordinario, ille statim ei delibetur sine aliqua inquisitione facienda*" (b. 3, f. 122).

(*a*) As already mentioned, the subject was one of great interest in that age, and it is not less interesting to those who desire to form a judgment on the events and controversies of those times. Bracton naturally, as a king's judge, treats the whole subject in a spirit strongly favorable to the jurisdiction of the king's courts, and he is betrayed into obvious inconsistency. Although he had laid down that the ecclesiastical courts had jurisdiction over things annexed to spiritualities, he lays down that they had not jurisdiction over advowsons or presentations to churches, though they had as to tithes; and though he admits their jurisdiction as to tithes, he says that if two rectors, under different patrons, contended about the tithes of their respective benefices, and the patron was not a party to the suit, yet as possibly the value of his patronage might be discussed, though he could not possibly be affected by a suit between these parties, the ecclesiastical court had no jurisdiction, unless the tithes were under a certain proportion, in which, it is manifest, there could be no principle (lib. 403). And then Bracton comes to the great question of custody of vacant bishoprics, which had formed the subject of such controversy under Henry II.; and he says that the king's courts could issue a prohibition as to things temporal, which pertained to the king by reason of his custody of vacant sees; and he gives an instance of such a prohibition to the dean and chapter of Rochester: "*Est et aliud genus prohibitionis ratione rerum temporalium quæ ad ipsum regem pertinere possunt ratione custodia archiepiscopatum et episcopatum vacantium et quæ occasionem inducunt prohibendi sicut pro Sancto Edmundo archiepiscopo Cantuariensis et fit prohibition hac forma: Rex priori et conventu Roffensis.*"

<sup>1</sup> Bract., 401 b.

<sup>2</sup> Ibid., 407.

<sup>3</sup> Vide vol. i., 409.

We find that a prohibition lay for a patron, not only where the rectors litigated a question concerning the whole tithes of the church, but also where the suit was for a part of them, as low as to the sixth part of the value of the advowson, but not lower; anything less than this being permitted to be determined finally by the spiritual judge.<sup>1</sup> There are many writs of prohibition for the maintaining of the king's rights during the custody of the temporalities; the pope and his partisans endeavoring to encroach on these secular claims, either by refusing clerks who were presented, or by other marks of opposition.<sup>2</sup> There is a writ of prohibition to stop a suit instituted against a bailiff of the king who had arrested a clerk for a felony or some other crime. If a suit was instituted in the ecclesiastical court to establish the legitimacy of children, with view to a claim to hold *per legem Angliæ*, a prohibition lay, because that court could not judge of legitimacy *quoad hæreditatem et successionem*, unless a plea was depending in the king's court, and bastardy was objected; and then the trial used to be remitted to the ecclesiastical judge, as has been already frequently mentioned. A prohibition also lay, if the ecclesiastical judge proceeded in an inquisition of bastardy, after the death of the plaintiff or defendant.<sup>3</sup>

Ex relatione quorundam nuper dedimus quod cum venerabilis pater E. Cantuariensis archiepiscopus habeat custodiam episcopatus Roffensis nunc vacantis vos trahitis in curia Christianitatis eundem archiepiscopum auctoritate literarum domini Papæ super quibusdam exenniis quæ prostanda, sicut de maneriis nostris, et eodem modo consuetudo qui alii annis redditus reddi solent episcopo si viveret, eoque idem archiepiscopus ea sibi reddi postulat ratione custodiæ ejusdem episcopatus temporæ vacationis. Et quoniam si vos in causa illa obbineatis manifestum esset nobis inde damnum incurrere si contingeret aliquando archiepiscopum Cantuariensis simul cum episcopatu Roffensis vacare et utrum quæ in manu nostra existere, vobis prohibemus in placitum illud sequamini, quia hoc esset contra coronam et dignitatem nostrum et prejudicium, libertatis nostræ quam habemus de episcopalibus vacantibus in regno nostri" (fol. 404). According to this, in the first place, though the king no longer claimed what had in former reigns been relinquished, the custody of vacant bishoprics, which belonged to the archbishops, yet he claimed to intermeddle in the temporalities, on the ground of some possible future interest, in case the archbishopric should become vacant — in which case the king would claim the custody of the temporalities. Then Bracton says there is another prohibition where a clerk, presented by the king, was rejected by the bishops as insufficient; and another has been instituted and is sued by the other in the ecclesiastical courts: "Ubi quis clericus presentatus ad ecclesiam per dominum regem propter insufficientiam recusatus fuerit et alius idoneus constitutus si velit inquietare velit." And then he gives the form of prohibition.

<sup>1</sup> Bract., 402 b.<sup>2</sup> Ibid., 403, 404.<sup>3</sup> Ibid., 404 b, 405.

In the following cases, it is laid down by Bracton, that a prohibition would not lie to the spiritual court; in all spiritual matters, or those annexed to the spirituality, in matters matrimonial or testamentary, or where penance was to be enjoined. Thus, says Bracton, in a suit relating to any tenement *per pontifices Deo dedicatum*, and so held sacred, as abbeys, priories, monasteries, and their cemeteries; or concerning things *quasi sacra*, because annexed to the spirituality, as lands, common, estovers, and the like given to a church, *in dotem*, as it was called, at the time of dedication; if the church was spoiled of these, and a suit was brought in the spiritual court for restitution, no prohibition lay; though this privilege was not allowed, if the lands were *in liberâ et purâ eleemosynâ*. In one place Bracton expresses himself as if a suit in the spiritual court, when for a liberty, a common, and the like, could be maintained only on a *recent spoliatio*;<sup>1</sup> though in another place he declares that recent spoliatio should be tried by assize.<sup>2</sup>

A prohibition would lie to the following suits: to a suit *de catallis clericorum violenter ablati*s, or for tithes; or for the value of them, if they were sold;<sup>3</sup> or on an obligation of surety for the purchase of tithes; or a promise of money *ob causam matrimonii*, not so if the promise was of a tenement; to a suit for a legacy, claiming it *ut debitum*; or for the legacy of a debt due to the testator, and acknowledged and proved to be such in his lifetime, because it so became a part of the testator's goods, which a debt, that had neither been proved nor confessed in his lifetime, or voluntarily confessed since, was not. Such a debt could only be established by suit at common law; till when it was no part of the goods, and so could not be bequeathed; it being a rule, first, that actions should not be bequeathed; secondly, that the ecclesiastical judge should not have cognizance of them; and thirdly, that executors should have no action for a debt which was not acknowledged<sup>4</sup> (that is, grounded upon a recognizance or judgment) in the life of the testator. If goods were bequeathed and sued for, the same of houses and edifices in some cities and towns which the testator had purchased, these being made *quasi catalla testatoris*, by his own disposition, (though it was otherwise in London, where prohibition would lie); if a *ususfructus*

<sup>1</sup> Bract., 408.<sup>2</sup> Ibid., 406.<sup>3</sup> Ibid., 407.<sup>4</sup> *Recognitum*.

of land, as a term for years, was bequeathed; a *ususfructus* being only a chattel; in all the foregoing cases, no prohibition would lie, in the time of Bracton;<sup>1</sup> for as the spiritual court was in unquestionable possession of causes matrimonial and testamentary, the above-mentioned questions, as arising out of a testament or marriage, were thought naturally to belong to the same tribunal. *Illud quod principale est trahit ad se quod est accessorium.*

It is laid down very positively by Bracton, that in a matter purely temporal litigated between two laymen, the jurisdiction of the cause could not be altered by any privilege whatsoever; and he instances the privileges of those who were *cruce signati*, which he considers as an indulgence warranted by no law: he says, that no oath, no *fidei interpositio*,<sup>2</sup> no voluntary renunciation of the parties could change the jurisdiction; as the renunciation of the party could have no effect beyond himself, it could not restrain the king in prohibiting a foreign jurisdiction from encroaching on his crown and dignity.<sup>3</sup>

The jurisdiction of a cause depended either upon the parties and the cause of action together, or on the cause of action singly. Thus, if a clerk sued a layman, or a layman a clerk, in the ecclesiastical court, in a matter purely temporal, a prohibition lay: the same if a clerk sued a clerk.<sup>4</sup> In these cases it appears that the cause of action was the principal ground of jurisdiction: but the cause of action would change its nature from spiritual to temporal; and so back again. Thus a lay chattel became spiritual, when tithed; and when the tithe was sold, it became again lay. Houses and other lay fees in cities and boroughs, if bequeathed by will, were, as has been seen, construed to be of a spiritual nature; but when the will was executed, they again became lay; and so of many others.<sup>5</sup>

There were two writs of prohibition, one to the judge, another to the party: the former ran thus: *Prohibemus vobis ne placitum teneatis in curiâ christianitatis, etc.*; the latter: *Prohibemus tibi ne sequaris placitum in curiâ christianitatis, etc.* If the judge to whom the prohibition was directed thought

<sup>1</sup> Bract., 407 b.

<sup>2</sup> This was a pretence under which causes were drawn into the spiritual court, in the early times of our law, as has been shown in the previous volume. *Vide* vol. i., 315.

<sup>3</sup> Bract., 408 b.

<sup>4</sup> *Ibid.*, 406.

<sup>5</sup> *Ibid.* 412.

it well founded, he would decree a *supersedeas* of the proceeding; if he doubted, it was usual to *consult* with the king's justices; to which *consultation* the justices would make answer by a writ, sometimes in their own name, and sometimes in the king's, as thus: *Dilecto in Christo tali. Inspectis literis vestris, quas nobis transmisistis, et plenius intellectis (sine præjudicio melioris sententiæ) consultationi vestræ duximus respondendum, quodd si res ita se habet sicut in CONSULTATIONE vestrâ nobis exposuistis, videtur nobis quodd in causâ istâ bene potestis procedere, non obstante regiâ prohibitione.*<sup>1</sup> If no such writ of *consultation* was sent, the prohibition remained in force.

It was not uncommon for the ecclesiastical judge to baffle a writ of prohibition by hurrying on the process against the party bringing the writ, and entangling him in a sentence of excommunication. When a person had stood excommunicated for forty days, the bishop used to send a writ to the king intimating this, and praying the assistance of the secular arm; *invocantes, quodd minùs valet ecclesia in hâc parte, dignetur regia supplere majestas*; the design of which was, that the party should be apprehended. But, upon suggestion of the fraud, the party might obtain another writ directed to the sheriff *de non capiendo*, which likewise commanded the sheriff to attach the clerical judge, that he might answer to the fraud. Any malicious application of the process of excommunication might be combated in the following manner. If a person was rightly excommunicated, and, having continued so for forty days, was imprisoned, and tendered surety for being forthcoming and answering to the suit, it ought, says Bracton, to be accepted; and accordingly a writ might be obtained, commanding the sheriff that if the ordinary maliciously refused a sufficient surety, the sheriff himself should take it, and order the prisoner to be set at large.<sup>2</sup>

If, instead of the above device, the judge and the party refused obedience to the writ, they might both be attached to appear either *coram rege*, or his justices *de banco*, or the justices itinerant, to answer for their contempt. This writ of attachment differed somewhat from that used on the same occasion in Glanville's time:<sup>3</sup> instead of repeating the prohibition, as it did then,

<sup>1</sup> Bract., 405 b, 406.<sup>2</sup> Ibid., 408, 409.<sup>3</sup> Vide vol. i., 339, 340.



it now began like other writs of attachment: *Si A. fecerit te securum de clamore suo prosequendo, tunc pone per vadium et salvos plegios B. talem ordinarium, quodd sit coram nobis*, as the case might be, *ostensurus quare tenuerit placitum in curiâ christianitatis de laico fædo ipsius A. in tali villâ contra prohibitionem nostram. Pone etiam per vadium et salvos plegios E. quod tunc sit ibi ostensurus quare secutus est idem placitum in eâdem curiâ christianitatis contra prohibitionem nostram; et habeas ibi nomina plegiorum et hoc breve, etc.* If the judge and the party lived in different counties, then there were separate writs for each. The process was the same as in other personal attachments,<sup>1</sup> of which we shall speak more particularly hereafter.

When the parties on both sides appeared in court, the plaintiff stated his count or declaration, or, as Bracton calls it, *intentio*, in this way: *Ego A. conqueror de B. quodd me injustè vexavit, ex gravavit trahendo me in placitum in curiâ christianitatis de laico fædo meo, scilicet, etc., unde damnum ad valentiam, etc.*; and to confirm and support his declaration he should add, that he showed the writ of prohibition in full court, and that, notwithstanding this, they proceeded to examine witnesses, or to excommunication; and then he should conclude by producing a *secta*, consisting of two at least, and as many more as he could procure. If the *secta* disagreed in their testimony, it was the same as if none had been produced; but as this was only a failure of proof, and not of right, the defendant used, nevertheless, to be enjoined not to proceed in the ecclesiastical court. If the *secta* agreed, then the defendants were to answer, and this might be done several ways. They might plead that it was a case of spiritual cognizance where no prohibition lay; or they might confess it to be temporal, but might, for plea to the plaintiff and his *secta*, say, that they did not proceed after the prohibition; or that no prohibition was tendered to them; and then each defendant might wage his law *duodecimâ manû*. When law was waged, and pledges given *de lege faciendâ*, a day was given to the parties for making their law; at which day they might cast an *essoïn*, and have another day by their *essoïners*; at which day, if they did not come nor cast an *essoïn*, judgment was passed against them, and they were obliged to pay damages to the plaintiff.

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<sup>1</sup> Bract., 409.

If they appeared, they were to produce their compurgators, who, like the *secta*, might consist of their friends and acquaintance. The *compurgatores* not being required, any more than the *sectatores*, to be equally impartial with recognitors, it was sufficient if they were of good report, and in general deserving of credit, and they needed not to be of the same rank or condition with the person producing them. The words in which *the law was to be made* were to pursue the form of the record; if they varied therein, the defendant stood convict, and, if a layman was committed to jail as guilty of a misdemeanor against the royal dignity in the same manner, says Bracton, as if he had committed a crime of *læsa majestas*; if a clerk, then, in consideration of his orders, he was, according to the same authority, treated more mildly; though he does not mention the sort of penalty: the damages used to be taxed in both cases by the justices according to the nature of the case.

This is the account given by Bracton of the manner of proceeding on a writ of prohibition; and it may be presumed that the proceeding in other personal writs was exactly similar. When Bracton comes to the subject of personal actions, he breaks off abruptly without carrying the reader through the whole proceeding, as he has here through the proceeding on a prohibition. This defect must be supplied, if possible, by what is to be picked up in other parts of his work, and particularly from the proceeding in prohibition which has just been related.

Thus far of questions relating to the jurisdiction of spiritual and temporal causes. Many other exceptions might be made to the jurisdiction of the judge. First, it was to be seen whether he had a proper authority: and in order to ascertain this, it is directed by Bracton that the writ by which the justice was appointed, after reading the original writ, should be read, unless the original writ made mention of his judicial authority. If the judge delegated his authority to another, the proceeding before such delegated person would be *coram non judice*. Certain persons had peculiar privileges in judicial matters. Thus, the Hospitallers, Templars, and many others had the privilege to be sued nowhere but *coram ipso rege, vel capitali justitiario*. The citizens of London were not to answer to any plea out of the city, except *de*

*tenuris et contractibus forinsecis*. The barons of the cinque ports were to answer nowhere but *apud Shypwey*.<sup>1</sup> It is said by Bracton,<sup>2</sup> that if a judge was suspected of any partiality, favor, or malice, it ought to be a ground of exception; but this he seems to give as an opinion of his own; yet he lays it down as settled law, that the jurisdiction of a judge might be declined, upon a real cause stated; as for consanguinity to the plaintiff, or being his friend, or companion, or counsel, or pleader to the plaintiff in the present or any other cause, or if he was an enemy to the defendant. All these are stated by Bracton as causes of exception to the judge exercising his jurisdiction to decide between the parties.<sup>3</sup>

When the jurisdiction of the court had been controverted and established, then was the original writ to be read again, and the tenant was to make such exceptions as the law allowed against the form of the writ. The requisites to constitute a legal and regular writ were many. It must be adapted to the cause of action. Thus, says Bracton, if a *magnum breve de recto patens* was brought, when it should be a *parvum breve* Abatement of the writ. *clausam*, the writ would abate though the action remained. Writs should be brought in their proper order. Thus, where a person had a cause of action that would entitle him to more writs than one, and he brought a writ of right, he could not, generally speaking, afterwards bring an inferior writ to recover the possession; though there were instances where a demandant had gone so far as to pray a view in a writ of right, and afterwards was permitted to sustain an assize of novel disseisin. A writ failed if it was grounded on the mode and quality of a fact, when it ought to be grounded on the fact itself; as the principal, says Bracton, should always be determined before the accessory. Thus, as has been observed in another place,<sup>4</sup> a man disseized with violence should not bring a writ *quare vi et armis*, because it only went to the quality of the disseisin, and not to the recovery of the tenement disseized.<sup>5</sup>

It was required that a writ should contain in it neither falsity nor error. It should, upon the face of it, appear

<sup>1</sup> Bract., 411.

<sup>2</sup> This was a good exception in the canon law, under the name of *Refutatio*. *Corv. Jus. Canon*, 279.

<sup>3</sup> Bract., 411 b, 412.

<sup>4</sup> *Vide ante*, 117, 133.

<sup>5</sup> Bract., 413.

free from all blemish. This seems to be required by Bracton more particularly in a writ patent; and whether it was patent or close, it should have no rasure; yet a difference was made between rasures. Thus, if it was in stating a fact the writ failed, for names and facts should be stated with fidelity, and if such an error was made either by the chancellor, or by some clerk, or the sheriff, or the attorney, the person guilty would, according to Bracton, be *in misericordiâ* to the king for all his goods, and be liable to be punished as for forgery. If a false seal<sup>1</sup> was affixed, or even the true seal falsely applied, that is, to a false writ, this was considered as an offence of majesty; and the offender, if a layman, was punished capitally; if a clerk, he was degraded and rendered infamous.<sup>2</sup> A writ abated, if obtained upon suggestion or falsehood, or the suppression of truth.

If the demandant or tenant died, the writ abated, and the action too; but if they were more than one, as parceners having one right, then, though the writ abated, yet the action survived.<sup>3</sup> If there was any error in the names of persons in the county or vill, the writ abated. If the tenant held less than the demandant claimed, the writ failed; not so if he held more. If, pending one action, the demandant brought another writ for the same cause of action, the second writ abated. We have before said, that the writ abated if the demandant died: it was the same if, being a bishop, or an abbot, or the like, he was deposed; but not if such bishop, abbot, or the like, were tenant in the action, for then the action would only be suspended till a successor was appointed, especially if the action was civil and not penal:<sup>4</sup> if it was both civil and penal, the action would hold both *ad poenam* and *ad restitutionem*, as long as he lived; but if he died, whether before or after deposition, the penalty was extinguished with the person, yet an action would lie against the successor for restitution by another writ. A personal writ abated by the death of the tenant, whether such death was civil or natural, but the action survived. A civil death followed upon an entry into religion, and if this was procured fraudulently after the purchase of the writ, it seems it would not abate the writ. If the demandant in his

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<sup>1</sup> *Tanquam falsarius.*<sup>2</sup> Bract., 413 b.<sup>3</sup> Ibid., 414.<sup>4</sup> Ibid., 414 b.

declaration exceeded the limit of the writ, as on a writ of possession to count for the right, the writ abated.

In short, almost all exceptions, says Bracton, which could be alleged might be properly ranked among pleas to the writ; because, if they went to the action, when the action was determined, the writ was, of course, at an end: whether the action was abated, postponed, or suspended, so was the writ. It was the opinion of some, that all pleas to the writ must be propounded, *simul et semel*, in one day.<sup>1</sup> When the writ was abated by reason of any defect or error, and such defect or error was corrected, it was considered as the same writ and the same action, though it was actually another piece of parchment and another seal, and therefore neither the declaration nor count, nor the attorney, needed be changed.<sup>2</sup>

If the writ was open to no exception, then the defendant was to see if there was any against the person of the plaintiff, so as that he could not Pleas to the person. at all, or at least not at that time, make his demand. Thus, it might be urged, that the demandant was a *servus*, or a bastard, or *sæculo mortuus*; that he was mad, and *non sanæ mentis*; or born deaf and dumb; or a leper; that he or some ancestor had been attainted of felony; that he was a minor. If a person was appealed of felony, he could not bring a civil suit till he had defended himself; nor could a defendant, under such circumstances, be bound to answer. It was a good plea to say, that the plaintiff was in confederacy with the king's enemies, or was in allegiance to the king of France, or to say that he was excommunicated.<sup>3</sup> It might be said, that the demandant had no right, but as parcener with another; or in right of his wife, so as he could no more sue without her than she without him.<sup>4</sup> Of some of these pleas we shall now speak more particularly.

The plea of bastardy was peremptory, for, if proved, it excluded the demandant forever from making any claim. It was always required that the special matters should be stated in the plea, otherwise there would be an obscurity

<sup>1</sup> Bract., 415.

<sup>2</sup> Ibid., 415 b.

<sup>3</sup> The leprosy of the mind, as Bracton calls it, like that of the body, as it excluded the unhappy object from the communion of men, so it precluded him from doing any lawful act.

<sup>4</sup> Bract., 415 b, 416.

and doubt whether the bastardy should be tried by the ecclesiastical court or not. Thus, having said *nihil juris habes in terrâ petitiâ quia bastardus es*, it should go on, *quia pater tuus nunquam desponsavit matrem tuam*; or thus, *quia inter patrem tuam et matrem tuam contractum fuit matrimonium illegitimum ex quo prius contraxit cum quâdam quæ vixit tempore, quando contraxit cum matre tuâ*; in both which it appears, that inasmuch as the question arose upon the marriage, it must be tried by the ecclesiastical court. But if it was thus, *quia natus fuisti per tantum tempus ante sponsalia vel matrimonium contractum inter patrem tuum et matrem tuam*; then, in such case, as the marriage was admitted on both sides, it is the opinion of Bracton, that the question, whether born before marriage or after,<sup>1</sup> might very well be inquired in the king's court.

We have before seen what scruples had been raised by the ecclesiastics upon this question of *natus ante matrimonium*, and what a positive declaration was made by the king and barons in the statute of Merton, passed in the twentieth year of this reign.<sup>2</sup> The matter was not suffered to rest there. We are told, that in the same year the king held a council, consisting of several bishops and lords, and that it was agreed by them all, that whenever the issue of *natus ante matrimonium* arose in the king's courts, the plea should be transmitted to the ordinary; and that an inquisition being made by him in precise words, *utrum talis natus sit ante matrimonium vel post*, he should send his answer to the king's court in the same words precisely, without any cavil:<sup>3</sup> that in taking such inquisition, all appeal should cease, as in other inquisitions of bastardy transmitted to the ordinary, and particularly if there should be need of an appeal that it should not be made out of the kingdom. It was commanded that this should be the practice in future. This regulation entirely precluded the ordinary from giving any judgment on the legitimacy, and confined him to the single inquiry of the fact, which he was required to certify in the very terms of the issue, leaving the king's judges to make their own conclusion upon it, which is precisely what Glanville lays down as the law upon this subject.<sup>4</sup> But, before this provision of the council, a

<sup>1</sup> Bract., 416.

<sup>2</sup> Vide ante, 60, 61.

<sup>3</sup> Sine aliquâ cavillatione.

<sup>4</sup> Vide vol. i., 372.

practice had obtained, as we have just said, of trying this special question of bastardy in the king's court. Thus, in the eleventh year of this king, in a writ of mortuance, the jurors found that the demandant was not the next heir, being born in adultery before marriage. It seems to have been considered as in the election of the king's judges, whether they would send such an inquisition to be made in the ecclesiastical court, or would try the question in their own.<sup>1</sup>

It is not, however, improbable, that it depended upon the form of the issue which court should be resorted to, or finally relied on, for the trial of this question; for if the demandant replied generally *quodd legitimus*, without answering to the special matter, and this obscure issue was sent to the ecclesiastical court, that court would probably certify generally *quodd legitimus*; but this would be such a failure in the ecclesiastical court as to induce the judges to cause an inquisition to be made in the king's court on the special matter: the same, if the reply had met the special matter, and the ecclesiastical court had certified generally *quodd legitimus*; though Bracton seems to think that such a general and obscure reply to the special cause of bastardy would pass for no reply at all, and that the demandant would be barred for want of a replication; and that, if he was a defendant, there would, in like manner, be judgment against him for want of a defence.

There were some questions of bastardy that would not, under any pretence, be transmitted to the ecclesiastical judge; as in case of a posthumous<sup>2</sup> or a supposititious child; or where the father had been absent from the mother abroad, so as to leave no presumption of legitimacy; which, however, depended upon the distance and the probability of access.<sup>3</sup> The plea of bastardy would not lie between persons of the same blood, in a possessory action (though it might between strangers), nor in a plea *de consanguinitate*, any more than in an *assisa mortis antecessoris*, because a question of bastardy between such parties was always upon the mere right, if the inheritance descended from a common ancestor; and so a question of right would be agitated in an action grounded only upon

<sup>1</sup> Bract., 417.<sup>2</sup> Ibid.<sup>3</sup> Ibid., 418.

the possession. It might be urged that such a plea was good, by the above rule, because a bastard was in truth a mere stranger as to the true heir; yet Bracton thought not, for it was at least doubtful whether he was not legitimate.

When bastardy was pleaded, and the other party maintained his legitimacy, it seems there was no rule, whether the bastardy or the legitimacy should be proved, except this, that the party who was *extra seisinam* should prove his plea, the person who was in seisin having no need, as Bracton says, to make out either one or the other; and this was the governing rule, whether the plea came from the tenant or demandant:<sup>1</sup> so that in this issue the point to be proved was, sometimes the legitimacy, and sometimes the bastardy, according as the *onus probandi* was imposed by the above rule.

The writ to the ordinary in cases of bastardy differed very little from that used in the time of Glanville. It recited that a suit was commenced, and that bastardy was objected to one of the parties: *Et ideo vobis mandamus, quodd, convocatis coram vobis convocandis, rei veritatem inde diligenter inquiratis, videlicet, atrum A. etc. Et inquisitionem, quam inde jeceritis, scire faciatis nobis, vel justitiariis nostris talibus per literas vestras patentes. Teste, etc.,* and so, *mutatis mutandis*, according to the special cause of bastardy. There was this difference between the writ of *natus ante matrimonium* in the time of Glanville, and that now in use, that they no longer inserted these words, *et quoniam hujusmodi inquisitio pertinet ad forum ecclesiasticum*: an alteration which probably had taken place since the statute of Merton, and the above-mentioned provision of the council on that subject. The same was observed if the ordinary was directed, as he sometimes was, to inquire concerning the legitimacy of a posthumous child; both these questions being triable as well at common law as in the spiritual court. But the above form of words was retained in all cases that were purely of ecclesiastical cognizance.

When the writ was sent to the ordinary, the plea remained *sine die* in the king's court till the inquisition was returned. The ordinary was to proceed to make inquisi-

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<sup>1</sup> Bract., 418 b.



tion in the presence of the parties, if they chose it,<sup>1</sup> and when made, there lay no appeal. When the inquisition was returned, the plea and the other party were summoned. The effect of a legitimacy proved in this way, if confirmed by judgment in the king's court, was, that the party became legitimate against all the world, unless any fraud could be proved in the method of proving it, and in the inquisition. A fraudulent inquisition might be obtained in this way. A demandant might bring several writs for recovery of land, and procure one of the tenants to object bastardy, and to suffer an inquisition to pass in his favor, for want of contesting the proofs of legitimacy. Legitimacy, when regularly proved, was good against all the world, and the heir of such person was likewise entitled to the benefit of it. It was a rule that no person's legitimacy could be questioned after his death by plea pleaded, as he could not, says Bracton, make an answer to it; but, notwithstanding, it might be inquired *per patriam* whether such person was a bastard or not, in the same manner as the question whether a person held in free tenure or in villenage; although it could not be inquired, after his death, concerning the personal condition of such person.<sup>2</sup> When profession, or entering into a religious life, was objected, this issue was always transmitted to the inquiry of the spiritual court.<sup>3</sup>

The plea of minority of the demandant was only a dilatory exception that did not abate the writ, but suspended the action till he came of age, at Of minority. which time the plea would be resummoned. There were some actions which a minor might bring, and some which he might not. A minor might demand his own seisin by assize of novel disseisin, and the seisin of his ancestor by *assisa mortis antecessoris*; but when he had so recovered, he was not obliged to answer either for the possession or right, till he was of age: yet he could not demand land in free socage of his ancestor's seisin, in a writ of right, before he was fourteen years old, nor *feudum militare* till he was completely twenty-one years old. On the other hand, a minor was bound to answer as well upon the right as upon the possession, if he had been enfeoffed of the land in question during his minority; and would have all the

<sup>1</sup> Bract, 419.<sup>2</sup> Ibid., 420.<sup>3</sup> Ibid., 422 b.

privileges of essoins, vouching, and the like, except that he could not appoint an attorney, and consequently he could not have the essoin *de malo lecti*. A minor was obliged to answer for a fact and injury of his own in a civil or criminal suit. Thus, he was liable to an assize of novel disseisin, and to a suit for dower. But where a grandmother had neglected for ten, twenty, or thirty years, during the life of her son, to demand dower, and brought a writ against the grandson, she was obliged to wait till he was of age, on account of the probability that she had agreed with her son and released the claim.<sup>1</sup>

A minor was obliged to answer in a matter that concerned the king. For such purpose an inquisition might be made, whether his ancestor died seized *ut de feodo*, without prejudicing the heir. A minor must answer to a fine, if pleaded; but if he was vouched by virtue of a fine, he need not answer; though he would be obliged to answer in *warrantia cartæ*. A minor must answer in *assisa mortis antecessoris*, and in every other plea concerning anything of which his ancestor did not die seized *in dominico ut de feodo*, but concerning nothing of which he died seized *in dominico ut de feodo*. If a minor lost by assize in a writ of possession, he might, when of age, recover in a writ of right. A minor must answer as well on the fact of another as on his own, so as to make restitution, though not *quoad pœnam*; as when a writ of entry was brought immediately after the death of the ancestor who had committed disseisin. A singular instance, where the privilege of infancy was dispensed with, is mentioned by Bracton. A man bound himself and his heirs to answer whether they were of age or not. This obligation was made in and by the advice of the court, and the heir was adjudged to answer, though a minor.

In the case of inquisitions taken for the king, a minor might have a writ to the following effect, to save himself from being affected thereby: *Rex vic. salutem. Præcipimus tibi, quòd non implacites vel implacitari permittas A. qui est infra ætatem, ut dicitur, de libero tenemento suo in villâ, etc., donec idem A. sit ætatis quòd possit et debeat secundum legem et consuetudinem Angliæ de tenemento respondere.*<sup>2</sup> If a minor was vouched to warranty in the county, he might have the following

<sup>1</sup> Bract., 421 b, 422.

<sup>2</sup> Ibid., 422.

writ to the sheriff: *Præcipimus tibi, quòd non permittas quòd A. implacitet B. de tantæ terræ cum pertinentiis in tali villâ, unde idem A. trahit ad warrantum C. qui est infra ætatem, et warrantus ejus esse debet, ut dicit, donec idem C. sit talis plenæ ætatis quòd possit et debeat secundum legem et consuetudinem Angliæ terram warrantizare.*

If there were more demandants than one, as parceners, and one was a minor, it would be a good plea against all: the same if parceners were tenants. So if a man seized in right of his wife was tenant to a writ, together with her, and she was within age, the plea against both would remain *sine die* till she was of age; not so if the husband was a minor, because, says Bracton, a woman might, by contriving such a marriage, defeat suits against her respecting her own lands. If the husband and wife were demandants, and she was a minor, and married before the writ purchased, the plea would remain *quousque*: if she married after, the writ abated, should the tenant so please, or the action was suspended till she was of age.<sup>1</sup>

Such consideration was shown to the feeble condition of a minor, that his estate, whether in services or tenements, descended to him from his ancestor, who was *peaceably seized* thereof *anno et die quo vivus, et mortuus fuit*, was not to be called in question till he was of full age. So, on the other hand, if a minor demanded services that were not due to him, and the tenants alleged,<sup>2</sup> *quietunciam quo die et anno antecessor vivus et mortuus*, they need not answer till he was of age. A minor was not obliged to answer to any *charta* till he was of age.<sup>3</sup> This held not only in services or tenements, but in rights and liberties, by which the tenements of others were affected; as a liberty to make a road, build a mill, and the like. Although he did not actually use these easements, yet he was considered in possession thereof till ejected or disseized; and such a seisin would descend upon the heir, whose estate therein was not to be changed during his minority.<sup>4</sup>

To a plea of minority in a writ of right or *assisa mortis antecessoris* against a guardian, the demandant might reply that he was of full age, as appeared by all his lords having restored his inheritances to him; or he might say, he had proved himself of age, either by inquisition *per pa-*

<sup>1</sup> Bract., 423.<sup>2</sup> *Quietunciam*, peaceable seisin.<sup>3</sup> Bract., 423.<sup>4</sup> *Ibid.*, 424.

*triam*, or before certain justices. To this it might be rejoined, that his inheritances were restored to him *per fraudem*; or that the jurors had sworn falsely, or that the justices had been deceived. The only sufficient and complete proof of full age was that by the parents, and the examination of witnesses; all others, as inspection and the like, were held only to induce a presumption: yet, says Bracton, if the justices, upon sight of the person, judging from his stature and other circumstances, pronounced him to be of age, his age was confirmed by judgment, and could not be again disputed. Should the justices hesitate to pronounce an opinion, then recourse was of necessity had *ad probationem patriæ et parentum*. This, says Bracton, was to be done by twelve lawful men, or more if necessary, some of whom were to be *ex parentelâ* of the person who said he was of age, the rest were to be strangers: all these were to be unsuspected, and were to declare the truth upon their oaths.<sup>1</sup> Another presumption of full age was a conclusion arising from the party having brought actions as a person of full age, which was an admission that would preclude him from pleading his infancy to any action brought against himself; whereas a proof of full age by jurors, according to some opinions, was not held conclusive against other persons, because the jurors might perhaps swear falsely.

If the minor was demandant, the proof was made without any resummons; but if he was tenant, and pleaded his minority, then the proof was not made till after a resummons. This was sued out by the demandant; and on the return, if there was any doubt, then they entered upon the proof in the way before mentioned.<sup>2</sup>

The excommunication of the demandant was only a dilatory plea. This was to be proved by the letter of the ordinary, or some judge delegated by him with proper authority. To this exception it might be replied that he was absolved upon an appeal, or that the cause of his excommunication was, his not obeying the ecclesiastical judge in a question of lay fee, and the like.<sup>3</sup> We have seen before, that when a person had been excommunicated for forty days, the ordinary used to certify this contempt, and, upon receipt of the bishop's

<sup>1</sup> Bract., 424 b.

<sup>2</sup> Ibid., 426.

<sup>3</sup> Ibid., 426 b.

letter, the chancellor would issue a writ to the following effect, directed to the sheriff: *Significavit nobis venerabilis pater N. per literas suas patentis, quod A. ob manifestam contumaciam suam excommunicatus est, nec se vult per censuram ecclesiasticam justiciari. Quia verò potestas regia sacro sanctæ ecclesiæ in querelis suis deesse non debet, tibi præcipimus, quod prædictum A. per corpus suum (secundum consuetudinem Angliæ) justicies, donec sacrosanctâ ecclesiâ tam de contemptu quàm de injuriâ ei illatâ fuerit satisfactum. Teste, etc.* When the person was taken, and had satisfied the ecclesiastical judge, he might be discharged, at the command of the bishop, by the following writ to the sheriff: *Quia venerabilis pater N. episcopus significavit nobis, quod A. quantum ad mandatum suum à te capi, et per corpus suum tanquam contemnentem claves ecclesiæ justiciari præceperimus, beneficium absolutionis impendit, tibi præcipimus, quod à prisonâ nostrâ quâ detinetur ipsum deliberari facias quietum, etc.* As no one could be taken, so none could be discharged, but by the command of the bishop; the law not giving such credit to an archdeacon or other delegated judge; because, says Bracton, *rex in episcopos coercionem habet propter baroniam*: nor was the party to be discharged till he had satisfied the ecclesiastical judge, unless where an excommunication was obtained by a false suggestion of the ordinary himself, or the malice of an adversary, in order to preclude the party from the right to bring an action; in which case a writ used to issue to the sheriff, reciting the fraud, and commanding him to discharge the injured person upon sureties, *nisi captus fuerit aliâ occasione, quare deliberari non debeat*. We have before seen that where such malicious proceeding was apprehended, the party might be beforehand with the ordinary by the writ *de non capiendo*.<sup>1</sup>

*Participes* were either co-heirs or *parceners*, or such as were afterwards better known by the name of *joint-tenants*. If an action was brought by one of several *parceners*, it might be pleaded, *quod non teneor ad hoc breve respondere, quia si jus haberes, participes habes, qui tantundem juris haberent in se quantum et vos, scilicet A. et B.* To this it might be replied, that all who could claim any right were named in the writ,<sup>2</sup> and no right was in *A.* because he was a bastard; nor in *B.*, because, born of a

<sup>1</sup> Bract., 427.<sup>2</sup> Ibid., 428.

villein, although his mother, from whom he claimed, was free; he might say, that the other parcener was in ligeance to the king of France, or that his ancestor committed felony, and many other matters might be replied to show that the parceners not named had no right.<sup>1</sup> If parceners were all of capacity to sue, and some brought a writ, and recovered without naming the others, Bracton says it was the duty of the judge to take care that the interest of those not named suffered no injury by this fraud. If they were all named, and some declined proceeding, yet the writ would stand good, and those who did not appear would be summoned, *quodd sint ad sequendum simul* with the other parceners, thus: *Summone per bonos sum A. et B. quodd sint coram justiciariis nostris die, etc. et loco, etc. ad sequendum cum C. et D. de tantâ terrâ unde prædictæ C. et D. clamant duas partes versus E. ut rationabilem partem suam, quæ eos contingit de hæreditate R. cujus hæredes ipsi sunt, et unde prædictus E. dicit quodd non vult prædictis C. et D. respondere sine prædictis A. et B. ut dicit; et habeas ibi, etc.*<sup>2</sup>

If the writ was brought against one parcener, he might, in like manner, plead this to the writ. But there was some difference, whether the inheritance was divided or not. If not, and they held in common, each had the same right to the whole; not indeed to himself, but only in common with the others; or, as they expressed it, *totum tenet, et nihil tenet, scilicet totum in communi, et nihil, separatim per se*. If the inheritance had been divided, and each held *pro parte*, the other parceners need not be named; yet, on the other hand, says Bracton, the tenant was not bound to answer without his parceners, and in prudence he ought not; for if he did, and he lost the land, he could have no *regressum* against his parceners to obtain a contribution. The tenant, therefore, if he pleased, might have a writ to summon them: *Summone, etc., quodd sint coram justiciariis, etc., AD RESPONDENDUM C. SIMUL CUM D. de tantâ terrâ, etc., quad idem C. in curiâ nostrâ clamat, etc., et sine quibus prædictus D. non vult respondere eidem C. cum prædicti, etc., sint participes ipsius D. de terrâ prædictâ, etc.* Should they appear, they might answer together with the tenant; but if they declined answering, the plea still proceeded; and whether they appeared or not, the tenant, if

<sup>1</sup> Bract., 428 b.

<sup>2</sup> Ibid., 429.

he lost, would be entitled to contribution. If the inheritance was not divided, then all the parceners must be made parties; but upon a plea that there were other parceners, the demandant might reply such matter as would disable them from claiming any right, and therefore as not being persons who need be named in the writ, the same as was before said in the case of a demandant.<sup>1</sup>

If there was no plea to the person, either of the demandant or tenant, the next consideration was such as might arise upon the matter itself.

Pleas to the action.

The thing in demand ought to be stated with certainty; in which the count or declaration, or, as Bracton calls it, the *intentio*, or *narratio*, should correspond with the writ.<sup>2</sup> Perhaps the tenant in the action was not tenant of the land, or was tenant only of a part; or perhaps he held it only in the name of another. Thus he might hold it in ward, *in vadium*, at will, or for term of years; in either of which cases the writ should be brought not against him, but against the person in whose name he was seized; and if this was pleaded, it would abate the writ.<sup>3</sup> In such

case he might plead, generally, *non tenet*, or that the freehold was not in him. If he put himself

Non tenure.

upon the country for the truth of such a plea, and it was found against him, he would lose the land in question, as a penalty for his false plea; the same, if he said he did not hold it, but another did. But if he admitted that he held part, and said that another held the rest, and this was found against him, he did not lose the whole, nor a part, on account of his false plea, but the suit went on, and he was to answer for the whole. He might plead that he once held the land, but that he did not at the present time.<sup>4</sup> If this was owing to an alienation before the purchase of the writ, no fraud could be objected; nor indeed, if after the purchase, provided he was ignorant of the writ. In some cases the alienation might be even after the summons, without being fraudulent; as if he went beyond sea, either before or after the purchase of the writ, not being prevented by the summons, and knowing nothing of it, and there made an alienation; but if neither of the before-mentioned cases could be proved, and especially if the alienation was after the summons had been testified

<sup>1</sup> Bract, 430.

<sup>2</sup> Ibid., 431.

<sup>3</sup> Ibid., 431 b.

<sup>4</sup> Ibid., 432.

and proved, he was considered as the real possessor, and was to stand to the suit as tenant.<sup>1</sup>

He might plead that he held only so many acres, whereas the demandant claimed so many; upon which an inquisition might be had by a writ to the sheriff, directing him to summon four, six, or more of lawful men of those who made the view, and by them to make inquiry whether the tenant held so many or so many acres. Again, in a plea of *non tenet*, if the tenant had before confessed in the county court that he held the whole, a writ went to the sheriff, commanding him to make a record of the plea in which such confession was made.<sup>2</sup> If the demandant, after a plea of *non tenet*, made a *retraxit*, and commenced a suit against another, the tenant would not suffer any penalty for his false plea.<sup>3</sup> Exception might be made to the name of the *vill*, any mistake in which would be an incurable error.<sup>4</sup>

Another part of the writ, or count, to which an exception might be made, was the claiming the land *Majus jus. ut jus meum.* To this the tenant might answer, that he had *majus jus*; and this issue would be tried by the great assize, or duel, as the tenant pleased. It has been before shown, that the best title, in the law, was where the *jus possessionis* and *jus proprietatis* were united, which was therefore called *droit droit*; and it was a maxim, that whoever had the *jus proprietatis* ought to have the possession. *Possessio sequitur proprietatem*, but not *vice versâ*. The *proprietas* might be separated from the *possessio* in this manner: Upon the death of the ancestor, the *proprietas* immediately descended to the next heir, whether he was present or not; but not being present, the *possessio* might be obtained by another, who put himself into seisin; by virtue of which the *jus possessionis* would descend to his heirs, through the negligence of him who had the *proprietas*. Thus, while the *jus proprietatis* descended on the elder brother, the younger brother might obtain seisin and die seized, transmitting to his heirs, together with the *jus possessionis*, which he himself had, a sort of *jus proprietatis*,<sup>5</sup> so that there would be two *jura proprietatis* in different persons by different descents; but one, as the descendants of the elder brother, would have MAJUS JUS

<sup>1</sup> Bract., 432 b.<sup>2</sup> Ibid., 433.<sup>3</sup> Ibid., 433.<sup>4</sup> Ibid., 434.<sup>5</sup> Ibid., 434 b.



*proprietatis*, on account of the priority; and those from the younger brother *minus jus*; yet the *possessio* of the latter would prevail till the former evicted them of the *jus proprietatis*.

Another plea which the tenant might plead was, that the demandant, or one of his ancestors, had released to the tenant, or some of his ancestors from whom he derived the *jus possessionis*, and quit-claimed for himself and his heirs by a fine made in the king's courts;<sup>1</sup> or that the demandant or some ancestor lost the land in question, in judgment in an action *de proprietate*, as by the great assize or duel, or a jury, on which he had put himself; and these pleas were to be proved by the record of the justices.

Release.

If the demandant or any of his ancestors had been apprised of any litigation, or final concord made concerning their right, and had not put in their claim, this silence might be pleaded against the demandant to a writ brought to establish such right. The manner of making a claim was simply by the words,<sup>2</sup> *appono clameum meum*; or, what had the same effect, by commencing a suit; a fact like this being a stronger proof than a mere claim that he did not mean to abandon his pretensions. This claim was to be made pending the plea, and the making of the *cyrographum*, or before judgment, provided he was in court at the time, or in the kingdom within the four seas; and in such case ignorance was no excuse; nor, says Bracton, as it should seem, would he afterwards be heard; for if it was a fine, the time taken up by the pendency of the action afforded, at least, a month for putting in a claim; for the summons ought to be served fifteen days at least, that being what was called reasonable summons; and the *cyrographum* used not to be allowed at the return of the writ, but a day was given, at fifteen days at least, when the *cyrographum* was to be taken, during all which time there was sufficient opportunity to make claim. Indeed a month was the period which Bracton says was limited for this purpose, *secundum communem provisionem regni*, and therefore he calls it the legal time for making the *cyrographum*; so that, if it was made before, it was fraudulent, and no claim need be made to invalidate

Fine and non-claim.

<sup>1</sup> Bract., 435.

<sup>2</sup> Ibid., 435 b.

it.<sup>1</sup> The place to make claim was in the king's court, at the time of passing judgment, or before.

However, there were certain causes of excuse, which would protect a party from the consequence of having omitted to make his claim; as, if at the time of the fine and making the *cyrographum*, the person who ought to make the claim was within age, or *non sanæ mentis*; if he was an idiot, born deaf and dumb, or the like. But when such person came to age, or recovered his senses, it was the opinion of some that he ought to make that claim then, which he could not make before; and, according to some, if a minor did not do it within a year after he came of age, he would not be excused; yet Bracton says that he was excused though he made no claim within that time, and that a claim need not be made at all, and would have no avail after judgment passed, or the delivery of the *cyrographum*. A person who was in prison at the time of the suit, or detained by such a disorder as did not allow him either to come or send, would be excused; as would also, for the same reason,<sup>2</sup> a person who was restrained by force, even out of prison. A married woman, even though she might send, would be excused, as *sub potestate viri*; so that all sorts of impotence seemed sufficient excuse; and upon this idea, a person who was *ultra mare* at the time was excused; and none of these, according to Bracton, need make any claim after those impediments were removed, if judgment was passed, or the *cyrographum* delivered.

Another case in which a party was excused, though he made no claim, was where the fine, according to the words of Bracton, *ipso jure sit nullus*, as if it was made of a tenement in the possession of another person, perhaps of the person himself to whom it was objected that he made no claim, or some ancestor, and not of him (or his ancestor) who pleaded the fine;<sup>3</sup> or if the fine was made by any collusion or fraud, or in any way so to the prejudice of another as that it ought not in justice and equity to hold good. A person would likewise be excused if there was no *cyrographum*; or, if a disseizor made a feoffment and then a fine, such a fine might be revoked and made void; so if, at the time of the suit, neither himself nor his an-

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<sup>1</sup> Bract., 436.

<sup>2</sup> *Ubi eadem ratio, ibi idem jus.*

<sup>3</sup> Bract., 463 b.

cestors had any title to the tenement in question; or if the ancestor who ought to have made the claim was not an ancestor through whom any right could descend to the person against whom the fine was pleaded. Bracton says, that notwithstanding a fine and *cyrographum* might seem *primâ facie* to be revocable in many cases, because the person making it was only tenant for life, in dower, and the like, or because the land in question was held in villenage; yet all persons were in law bound by this judgment, and therefore, if they made no claim, they would not be excused. In short, it is declared by Bracton, that no person should be excused if he was in the kingdom, *infra quatuor maria*, and had it in his power to come or send, so that even a person *in languore* would not be excused, because he might send.<sup>1</sup> If a person was *in servitio regis*, so as he could neither come nor send, he was excused, although he made no claim. Thus stood the law upon the subject of claim to suspend the effect of a judgment or fine.

From the manner in which Bracton speaks of a fine, it should seem as if this judicial concord was entered into after a proceeding was commenced on any writ whatsoever which was grounded on the *proprietas*, and that it was not confined to a writ of covenant, grounded upon the breach of a supposed prior agreement and concord; it seems particularly to have been made in a writ of right, and is all along mentioned in company with a judgment therein upon the great assize or duel.

We have now dismissed the subject of real actions, through all their parts and kinds. It remains to add something on the nature of process in actions personal. These, like real actions, were commenced by summons; but if a defendant omitted to appear upon a lawful summons, the contempt was treated in a different manner, for they proceeded by attachment, as appeared in Glanville's time (a).<sup>2</sup> Personal actions differed likewise

Of personal  
actions.

(a) The *Mirror* says, in personal actions defaults used to be punished in this manner. "The defendants were distrained to the value of the demand, and afterwards they were to bear their judgments for their default, and for default after default judgment was given for the plaintiff. This usage was changed in the time of Henry I.; that no freeman was to be distrained by his body for an action personal, so long as he had lands, in which case the judgment for default was in force, till the time of Henry III.; i. e., that the plaintiff should recover seisin of the land, to hold the land until satisfaction

<sup>1</sup> Bract., 437.

<sup>2</sup> Vide vol. i., 391.

in their process, according to circumstances: in some causes, which from their nature would not bear delay, as where the subject was the fruits of the earth, or other things which were perishable; the *solennitas attachiamen-torum*, as it was called, was dispensed with.<sup>1</sup> So again, where the lapse of a benefice was apprehended, or where the injury was very atrocious, or the plaintiff deserved a particular respect or privilege, as noble persons, or merchants who were continually leaving the kingdom. But in personal actions which did not require such special favor, if the defendant did not appear to the summons, and the plaintiff offered himself in court the first, second, third, and fourth day, he was not to be waited for any longer; but whether the summons was proved or not, so as it was not openly denied, he was to be attached by pledges. Upon which the entry on the roll was thus: *A. obtulit se quarto die versus B. de placito*; then the substance of the writ was added, and it went on, *et B. non venit, et summonitus, etc., Judicium, Attachietur quoddam sit coram, etc.* The writ of attachment was: *Pone per vadium et salvos plegios B. quoddam sit coram, etc., ad respondendum de placito*; and then followed the substance of the writ as upon the roll. The following instances of such entries upon the roll are

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was made. In actions where the defendants were not freeholders, they used to be punished in this manner: first, process was to be awarded to arrest their bodies; and those who were not found were outlawed" (*Mirror*, c. iii., s. 5). Elsewhere it is said personal actions bear their introduction by attachments of the body; but not by summons and mixed actions; first by summons, and afterwards by attachments. The difference was, that where the defendant had land, the seizure of that would be sufficient coercion to appear; but where he had no land, then the person was to be seized. The passage in the *Mirror*, however, it is to be observed, was written after the time of Henry III.; and the above allusion to an alteration in the law is no doubt to the statute of Marlbridge, 51 Hen. III., after Bracton's time, allowing that accountants who had no lands might be attached by their bodies, *i. e.*, arrested at common law. It should seem by the *Mirror* that defendants in personal actions could be distrained by their bodies until the time of Henry I., and then if they had no lands. But the usage must have altered in order to require the statute of Marlbridge: so much did the law fluctuate in the earlier ages of our law. As regards summons, it has already been observed, the period allowed for appearance varied with the nature of the action, and was shorter in personal actions than real actions; and Fleta says it was shortest in mercantile causes: "*causæ mercatorium*" (lib. vi., c. vi.). It is to be observed that attachment might be of the *person* or of the *goods*; and thus the *Mirror* speaks of a man being distrained by his body, *i. e.*, arrested. In Glanville's time, it appears that in real actions the land was seized, and the parties might be attached by their bodies for contempt; but nothing is said as to personal actions.

<sup>1</sup> Bract., 439.

given by Bracton: *De placito quare non tenet ei conventionem inter eos factam, or finem inter eos factum, de, etc.*—*De placito quodd warrentizet ei tantam terram cum pertinentiis, etc.*—*De placito quare non facit ei consuetudinem et certa servitia, quæ facere ei debet, etc.*—*De placito quodd reddat ei tantam pecuniam quam ie debet et injustè detinet, etc.*—*De placito quare* Attachment.  
*idem B. simul cum aliis venit ad domum suam, et ibi did such a trespass, contra pacem nostram.* Thus the attachment pursued the nature of the original writ, and at the end was added this clause: *Ad ostendendum quare non fuit coram, etc., sicut summonitus fuit*; or if he had essoined himself to a particular day, then, *ad ostendendum quare non servavit diem sibi datum per essoniatorum suum, etc.*, to which he was to answer before he answered to the principal point; and if he could not excuse himself, he was to be *in misericordiâ* for his default.

If he did not appear after this first attachment, then, upon the plaintiff offering himself, he was to be attached by better pledges, to answer on another day. This was called *aforciamantum plegiorum*, and was in the nature of distress for service, where, if the party appeared not at the first distress, more cattle were taken *pro aforciamento districtionis*.<sup>1</sup> The entry on this occasion was: *A obtulit se quarto die versus B. deplacito, etc.*, as before; *et B. non venit, et aliàs fecit defaultam postquam fuit summonitus; et ita quodd attachiatus tunc fuit per C. et D. Judicium, Ponatur per meliores plegios quodd sit, etc.*, upon which there issued a second attachment, in which was likewise contained a summons against the former pledges, to show cause why they did not produce the defendant, as they had engaged to do. If neither the defendant nor pledges appeared to this writ, all the pledges were *in misericordiâ*, and not the defendant; but then all the defaults fell upon the defendant, as if he had found no pledges at all; and a writ issued, *quodd sit ad audiendum judicium suum de pluribus defaultis*; and from that day all aforcement of pledges ceased. If the defendant appeared to the second attachment, then only the first (and not the second) pledges were to be amerced, unless they showed cause why they did not produce him at the first attachment. However, though the defendant was not to be amerced, but summoned to hear judgment on

<sup>1</sup> Bract., 439.

his defaults, yet Bracton thinks it was otherwise in regard to a plaintiff who had found pledges *de prosequendo*, and did not prosecute his suit; for, according to him, they were all to be amerced, as well the principal as the pledges.

If, at the first day of summons and attachment, neither defendant nor plaintiff appeared, the plaintiff did not, however, lose his writ. When the defendant had been attached by better pledges, and did not come to his day, nor within the fourth day, and the plaintiff did,<sup>1</sup> the entry was thus: *A. obtulit se quarto die versus B. et B. non venit, etc., et plures fecit defaultas, ita quòd primò attachiatus fuit per C. et D. et secundò per E. et F. et idèd omnes plegii in misericordiâ*; and then the process above alluded to issued against the defendant, commanding the sheriff, *quòd habeas coram, etc., corpus B. ad respondendum A., de placito, etc., ad audiendum judicium suum de pluribus defaultis, etc.* If he came at the day, and could not save his defaults, he was to be amerced for them, and then to answer to the action. If he did not appear, but concealed himself, or, as they called it, *latitaverit*, so that the sheriff returned, *he was not to be found in his bailiwick*; then the entry was thus: *A. obtulit se quarto die versus B. de placito as before; et B. non venit, et plures fecit defaultas, ita quòd præceptum fuit vicecomiti, quòd haberet corpus ejus; et vicecomes mandavit, quòd non fuit inventus in ballivâ suâ, et idèd vicecomes distringat eum per omnes terras et catalla, quòd sit ad, etc., upon which there issued a writ of *distringas* against his lands and chattels. If he did not appear to this writ, his default was punished by another writ of *distringas*, commanding the sheriff to distrain his lands and goods, *et quòd sit securus habendi corpus ejus* at another day. If he still made default, the next *distringas* was, *ita quòd nec ipse, nec aliquis pro eo, nec per ipsum manum apponat in terris, tenementis, bladis, nec in aliis catallis*. If he still made default, the next *distringas*, if it could be so called, was *quòd capiat omnes terras et omnia catalla in manum domini regis, et capta in manum domini regis detineat, quousque dominus rex aliud inde præceperit, et quòd de exitibus respondeat domino regi*: and beyond this there was no further process *per terras et catalla*; they being both taken into the king's hands by the sheriff, who was to answer for the profits to the crown.*

<sup>1</sup> Bract., 440.

What step was to be taken by the plaintiff who had suffered all these delays? For it was hard that, after all, he should lose the effect of his suit. Bracton thinks that in this there was a difference between actions upon a contract for a sum of money and for a trespass. In the former, he thought it would be right to adjudge to the plaintiff a seisin of the chattels to the amount of his demand, and to give him a day, and summon the defendant; when, if he appeared, the chattels should be restored, upon his answering to the action: if he did not appear, he should not be heard upon the matter, but the plaintiff should become lawful owner thereof. But if it was an action of trespass,<sup>1</sup> then he thought, the justices should estimate the damage sustained; and the rents and chattels of the fugitive being valued, a portion should be taken into the king's hands to the amount of the damage, as a penalty on the defendant.

Should the defendant, however, not be found, nor have any land or goods, he did not wholly escape the resentment of offended justice; for whether it was an action for money or a trespass, the defendant was to be demanded from county to county, at the suit of the plaintiff, till he was outlawed. Persons so outlawed were not, upon their return, or being taken, to lose life or limb, as those outlawed for crimes; but were condemned to perpetual imprisonment, or to abjure the realm.

It sometimes happened that the sheriff did not execute the attachment nor return the writ; and then, Execution of the writ. upon the plaintiff offering himself, the entry was thus: *A. obtulit se quarto die versus B. de placito, etc., et B. non venit, et præceptum fuit vicecomiti, quodd attachiaret eum, quodd esset ad talem diem, et ipse vicecomes inde nihil fecit, nec breve quod ei inde venit, misit; et ided præceptum est vicecomiti, sicut aliàs quodd attachiaret eum, quod sit ad, etc., et quod ipse vicecomes sit ibi auditurus judicium suum de hoc quod prædictum, etc., non attachiavit, nec breve quod ei inde venit, misit, sicut ei præceptum fuit.* Upon this there issued an aliàs attachment: *Præcipimus tibi, sicut ALIAS tibi præceperimus, etc.*<sup>2</sup> If the sheriff did nothing upon this writ, nor showed any sufficient excuse, he was amerced for his contempt, and was commanded a third time to attach the party: *Præcipimus tibi, sicut SÆPIUS præceperimus, etc.*

<sup>1</sup> Bract., 440 b.

<sup>2</sup> Ibid., 441.

Sometimes the sheriff sent an excuse for not executing the writ. He would sometimes return, that the writ came too late to be executed; that the party was not to be found in his bailiwick; that he was wandering from county to county, and had no certain residence; that he had no lands or chattels by which he might be distrained; and many other excuses might be feigned. Again, should the sheriff err in the sort of attachment; as when he was to take pledges should he make a distress; or, instead of taking the person, should he admit to bail; in all such cases it was usual to make an entry of the return, and to specify it in the writ that issued in consequence thereof: as, for instance, *et B. non venit, et vicecomes mandavit, quod non attachiavit eum, quia recepit breve tam tardè quod præceptum domini regis exequi non potuit*: and if it was proved that he received the writ in good time, or in the county court, and might have executed it, the record went on, *Et testatum est, quod istud recepit satis tempestivè* (or *in comitatu ubi attachiandus præsens fuit*), *et ideo, præcipiatur quod, etc.* Upon this a writ issued, commanding him to attach the party,<sup>1</sup> and appear himself to answer for his default; and if he failed in either, he was *in misericordiâ*. A sheriff was sometimes excusable for not executing process by reason of some liberty which he could not enter, because the lord thereof had the *retorna brevium* therein. In such case, the sheriff was to command the bailiff of the liberty to execute it; and if he did not do it, the sheriff was excusable before the justices, by making a return, *quod præceptum est ballivo*. When the bailiff thus failed in doing his duty, the sheriff was then commanded not to omit doing it by reason of that liberty; under which special warrant the sheriff had an authority that did not generally belong to him. The entry upon the record was, *Et vicecomes mandavit, quod præcepit ballivis libertatis, et ipsi nihil inde fecerunt, et ideo præceptum fuit vicecomiti, quod NON OMITTAT PROPTER LIBERTATEM quin, etc.*, and there issued a writ *quod non omittas*, containing an attachment, *distringas, habeas corpus*, or whatever the necessary process might be, by which also the bailiff of the liberty was summoned to show cause for his neglect.<sup>2</sup>

If the sheriff was resisted in the execution of this writ

<sup>1</sup> Bract, 441 b.

<sup>2</sup> Ibid., 442.



by the bailiff or lord of the franchise, there issued another *non omittas*, with a clause authorizing him to go, with some sufficient knights and free men of the county, and take the bodies of such as resisted them, and keep them in prison till the king's pleasure was known concerning them. The lord of the liberty was likewise attached to appear and answer for the offence; and if he could not deny it, his liberty was seized into the king's hands for such an abuse of it.

A sheriff might say that the person was a clerk, and claimed the privilege of a clerk not to find pledges, and that he had no lay fee by which he could be distrained. It seems from Bracton, that in such case they did not proceed directly against a clerk, particularly in trespasses; but the course was to resort to the archbishop, bishop, or other in whose diocese the person to be attached resided, or had an ecclesiastical benefice, and require him, *quòd faciat, etc., clericum venire*.<sup>1</sup> If the bishop neglected to obey this writ, he was summoned to answer for his default; to which if he made no appearance, there ran against him all the *solennitas attachiamentorum*, as in other distresses, and he was immediately distrained by his barony;<sup>2</sup> and if neither the bishop appeared nor the clerk, then they proceeded by judgment of the court against the clerk, who was arrested and detained till he was demanded by the bishop. At any rate, it was expected, a bishop who held a barony of the crown should obey the king's writs; and if a clerk did not appear, the bishop might bring or send an excuse why he had not the clerk according to the requisition of the writ; he might say that he had no benefice in his diocese by which he could be distrained; or if he had a benefice, he might say that he was a student at Paris beyond the sea, that he did his utmost in sequestering him by his prebend and other benefices, and could do no more in the way of compulsion. This would be a complete justification for the bishop, and all process would cease till the clerk returned, and could be taken; and then, if the bishop omitted, the sheriff might proceed as above mentioned.<sup>3</sup>

It was said before, that in some personal actions the *solennitas attachiamentorum* was not to be observed, and this was in several cases of privilege; as, in addition to those that have been already mentioned, where the plaintiff was a crusader or a merchant, whose affairs demanded despatch;

<sup>1</sup> Bract., 442 b.<sup>2</sup> Ibid., 443.<sup>3</sup> Ibid., 443 b.

where there was some urgent necessity; as in assizes of darrein presentment, *quare impedit*, and *non permittit*, lest the plaintiff should incur the lapse of six months; where the subject in contest was a perishable article, as ripe fruit; or, in an action of trespass, where the injury was atrocious, and against the king's peace; where regard was to be had to the quality of the person injured, as the king, queen, or their children, brothers, sisters, or any of their relations or kin; in any of the above cases, it was usual, in the first instance, to have a writ to the sheriff, *quod habeat corpus, etc., ad respondendum*. But this writ against the body, instead of the clause *ad audiendum judicium de pluribus defaultis* (which would have been absurd), had one containing the cause wherefore the formality of attachment was dispensed with; as *Præcipimus tibi, quod, omni occasione et dilatione postposita, propter privilegium mercatorum, quorum placitum instantiam desiderat, habeas, etc.*, and so in other cases. But, notwithstanding this intention to avoid delays, the defendant might have an *essoïn de malo veniendi*, before he appeared.<sup>1</sup> In capital cases there was no attachment but that *per corpus*: and any one, with or without a precept, might arrest such an offender.<sup>2</sup>

In mixed actions, as those for dividing a common, *de proparte sororum*, of *partition*, and the like, the usual process was, distress real, and not distress personal.

Thus far Bracton speaks of the commencement of mixed and personal actions; but, notwithstanding the full manner in which he has treated the whole proceedings in real actions, he leaves these without any further discussion.<sup>3</sup> The small proportion that personal property bore to real, in these days, might be a reason why the remedies provided for the recovery of it, should have undergone very little consideration (*a*). Consistently with the infe-

(a) There is a whole chapter upon contracts (c. ii., s. 27), which are expounded very fully, whether as to their nature, simple contract or deed, or their subject matter, leases, bailments, and the like; and it is said, "according to the nature of the actions, the forms of the remedial writs are adopted." But then, as the remedy would in most cases be far more convenient in the county court, the only remedial writ would be "justicies," to the sheriff to empower them to hear the case in that court. In the vast majority of cases, this would be the most convenient course; and hence little is said about the procedure in such actions in books which professedly treat of proceedings in the king's superior courts, which were, for the most part, confined to suits relating to real property. The *Mirror* shows that there were personal actions, with procedure as well adapted to them as those in real actions; and in the *Mirror* they are treated of as fully. The reason why the author had not

<sup>1</sup> Bract., 444.

<sup>2</sup> Ibid., 444 b.

<sup>3</sup> Vide ante, 190.

rior light in which personal property was held, it is probable that the nature of personal actions had not been much refined upon. We shall see, in the following part of this history, how they gradually grew into notice, and at length became equally important with real actions. It is to be lamented that our author passes over with the same silence the redress to be obtained by a writ of error; the practice of which must be collected from authorities of a later period.

found so much about them in Glanville or in Bracton was, that those authors — both of them judges in the king's superior courts — confined themselves to proceedings before those courts, and their proceedings were almost entirely in real actions. Because (as has been seen), originally, the primary jurisdiction in all actions was in the county courts, whose jurisdiction was not limited, as that of the courts-baron was, to sums under forty shillings, but extended to any amount; because there were no other courts of primary and ordinary jurisdiction. And though a practice had arisen of requiring the king's writ of justices to the sheriff, to give the county court jurisdiction in cases above that amount; yet it is probable that, for many reasons, the cases which concerned mere personal rights of action continued to go into that court, and were not removed thence, so often as causes which concerned the inheritance. Moreover, some actions, as in debt, in which wager of law — a usage arising out of the old Saxon system of compurgators — was allowed, and which actually, in law, survived to our own times (although, of course, obsolete ages ago), was one which, if it were to be resorted to, would be far more conveniently resorted to in the county court, where all the compurgators would be well known, than in the *curia regis*. Added to this, the nature of personal actions generally required a greater degree of speed in the proceedings than real actions, in which speed was not of great importance, and which required deliberate judgment. That personal actions were not only numerous, but far more numerous than real, will be manifest upon a little consideration, and is apparent from many passages in the *Mirror*. The matters and transactions out of which they arose were of daily and hourly occurrence; whereas suits to recover real estates must, from their nature, be far fewer in number than cases of trespass, for instance, for trespass or distress, would occur every day; while actions to recover land would be in comparison few. The *Mirror* mentions many classes of personal actions, and treats of them so fully as to show that they were common. For instance, there is a whole chapter upon wrongful distresses, which were very frequent in those times, and of which the *Mirror* says, "An action granted upon personal trespass, occurreth to people wrongfully distrained; and it is said that if the distress is carried away (out of the county), the cognizance belongs to the king's court, which could grant replevin; but to hasten the remedy, the sheriffs and hundredors had power to take sureties, and deliver the distresses, and hear and determine the complaints of the wrongful distress." And it is obvious that these were, for many reasons, cases fit for the local courts. And so, for various reasons, of the greater proportion of personal actions. The *Mirror* mentions various classes of such actions in different passages. Thus, in one place it speaks of actions of account, and of leading away distresses (c. iv., s. 5); and in another place, of actions where one denies his gift, his bailments, his deed, or other kind of contract (c. iii., s. 23); and in another place, of obligations and covenants (c. ii., s. 32), and trespasses, and taking of goods (c. i., s. 24).

## CHAPTER VIII.

### HENRY III.

THE EYRE—THE JURY—CAPITULA ITINERIS—OF LÆSE-MAJESTY—WHO TO JUDGE THEREOF—OF HOMICIDE—THE OFFICE OF THE CORONERS—IMPRISONMENT AND BAIL—OF OUTLAWRY—AT THE KING'S SUIT—REVERSAL OF OUTLAWRY—OF MURDRUM—PRESENTMENT OF ENGLISHERY—ABJURATION—ORDEAL GOES OUT OF USE—THE DUEL—APPEAL OF HOMICIDE—EXCEPTIONS THERETO—PROCEEDINGS PER FAMAM PATRIÆ—OF OTHER APPEALS—OF THEFT—OF PROVORS—OF VETITUM NAMIUM—DIES COMMUNES IN BANCO—STATUTE OF MARLBIDGE—DISTRESSES—WRIT OF ENTRY IN THE POST—LEGATINE AND PROVINCIAL CONSTITUTIONS—THE KING AND GOVERNMENT—STATUTES—BRACTON—MISCELLANEOUS FACTS.

WHAT has been said of our criminal law in the reign of Henry II. was confined to such pleas as related to the king's crown and dignity. We shall now be enabled to treat more fully of this subject in all its parts. As criminal justice was most commonly administered in the country before the justices itinerant,<sup>1</sup> it may be proper to give some account of the course of proceeding there; after which we may go on to the consideration of crimes, as to their nature and punishment; with the method of pursuing and prosecuting offenders, from the time of the fact committed to their condemnation in court (a).

(a) The author here follows Bracton, who speaks only of justices itinerant; and he appears to have regarded the justices itinerant and the justices in eyre as the same; but the former were at first appointed to go their circuits yearly, or twice a year; whereas the latter, there is reason to believe, went once in seven years. It appears that, towards the latter part of the reign, the justices itinerant were restrained from going oftener than once in seven years (*Lord Littleton; Hen. II.*, vol. ii., p. 208); and in the histories of the contemporary chroniclers, it is stated that the people actually remonstrated against their coming oftener. The explanation of this is, that their commissions were not merely for the administration of justice, but also embraced the collection of various branches of the royal revenues—fines and amercements, talliages and forfeitures; and they often pressed their exactions so that they were dreaded as oppressors rather than hailed as protectors. The *Mirror*, under the head of "Justices in Eyre" (not mentioning justices itinerant), says that it was ordained that kings or their justices should go circuit every seven years through all the shires, to hear and deter-

<sup>1</sup> *Vide ante*, vol. i., 270.

Previous to the coming of the justices itinerant, there issued a general summons, as was before shown<sup>1</sup> for all persons to attend at a certain place and time; which time was to be at least fifteen days from the proclamation of the summons. When the justices came, the first step to be taken was to read the *writs* or commission under which they derived their authority. After this, if the justices pleased, one of them, being, as Bracton says, *major et discretior*, was openly to propound the occasion of their coming, to enlarge upon the utility of the institution of *itineria*, and the benefits that followed from keeping peace and good order; he was particularly to notice the violation of justice committed by murderers, robbers, and burglars; and inform the whole assembly that the king commanded all his liege subjects by their faith, and as they would preserve their own property, to give every advice and assistance towards repressing such and the like offences.

After this, says Bracton, the justices were to withdraw into some private place; and call to them four, or six, or more of the *majores comitatûs*, who were called<sup>2</sup> *busones*

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mine all pleas, receive the rolls of sheriffs, bailiffs, etc., and see if any had erred, either in the law or to the damage of the king, and those things which they found not determined, they should determine them; and that in the eyre they should inquire of all offences which belonged to the king's suit and jurisdiction, i. e., involved fines or amercements at his suit. And they were to inquire of all manner of pleas and presentments after the last eyre taken and received—the first to inquire, hear, and determine the articles presented in the last eyre which were not ended, and afterwards to determine matters since then (c. iv., s. 21); and it is elsewhere said to be an abuse that a man should have an action personal from a longer time than since the last eyre (c. v., s. 7); and it appears, also, that crimes were not inquired into if committed before the last eyre. Thus, then, it seems clear, that justices “in eyre” (a phrase probably derived from the old word *eyrer*, to go, from the Latin *ire*, and akin to the Latin word, *iter*, used in Bracton), meant justices who went once in seven years to hear and determine pleas of the crown, and all other matters which justices itinerant would hear. Britton also, who wrote after the end of this reign, has a heading, “De Eyres:”—“Quant a nos venes al eyres de nos justices.”

<sup>1</sup> *Vide ante*, 191.

<sup>2</sup> The anomalous appellation of *busones* is to be met with nowhere but in this passage of Bracton. Sir Henry Spelman says, he had seen a MS. that was written *barones comitatûs*; if so, it possibly means the *barones majores*, or *lords* within the county. The distinction between *barones majores* and *minores* had become more important in the days of Bracton than it had been before; for it is supposed that the latter were, about that time, excluded from the legislature, writs of summons being directed only to the former. *Vide* Spelman and Du Cange *voce busones*.

*comitatibus*; being persons on whom the rest depended, and by whom they were governed. With these the justices were to converse, and show how provision was made by the king and his council for all persons, as well knights as others, being fifteen years of age, to make oath that they would not harbor any outlaws, murderers, robbers, or burglars, nor collude with those who did; and, if they knew of any, that they would cause them to be attached, and report it to the sheriff and his bailiffs; that they would follow every hue and cry with their family and men; that they would arrest all suspected persons, without waiting for the mandate of the justices or sheriff, and make report to the justices or sheriff of what they had done. These principal persons of the county were to swear to observe all this; and moreover, that if a person came into a town to buy victuals which were suspected to be for the maintenance of malefactors who were harbored in the country, they would arrest the party, and deliver him to the justices or sheriff; that they themselves would not receive any stranger into their houses by night; or, if they did, that they would not permit him to go before it was broad day, and then not without the testimony of three or four neighbors.<sup>1</sup>

After this conference with the principal people of the county, the justices, we may suppose, returned into the open court, to attend to the rest of the business. The next step was the calling over the serjeants and bailiffs of hundreds, each of whom was to swear to choose out of his hundred four knights, who were to come immediately before the justices, and make oath that they would elect twelve other knights; or, if knights could not be had, twelve *liberos et legales homines*, who were no appellors, nor appealed, nor suspected of breach of the peace, or the death of a man, or other offences, and such as were well qualified to despatch the king's business on that occasion. The names of these twelve were immediately to be inserted in a schedule, which was to be delivered to the justices. As the twelve of each hundred appeared, one of them took the following oath: "Hear this, ye justices, that I will speak the truth of that which you shall command me on the part of our lord the king;

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<sup>1</sup> Bract., 115 b, 116.

nor will I, for any thing, omit so to do, according to my ability; so help me God, and these holy gospels;" after which every one was to swear separately for himself, "The oath which John here has taken, I will keep on my part; so help me God, and these holy gospels." When they had all sworn in the above manner, the *capitula itineris* were read to them in order; and *Capitula itineris.* when those were gone through, the justices informed them, that they were to answer in their verdict, separately and distinctly, upon every article thereof, and were to have their answer there at a certain day. Besides this, they were to be told, privately, that if any knew of any suspected persons in his hundred, he should instantly take them if they could be found; if not, their names were to be conveyed to the justices, in a schedule, privately, that they might not have notice to escape; upon which the sheriff would be commanded to take them, and bring them before the justices.

These articles of inquiry, called the *capitula itineris*, were not always the same, but differed as times or places required. We have before given some specimens of the *capitula* in the preceding reigns;<sup>1</sup> the following are the articles of inquiry mentioned in Bracton. The first was of the old pleas of the crown begun before the former justices, but not determined; then of the new pleas of the crown that had arisen since (for such as had happened before the former iter, and had not been prosecuted, could not now be inquired of; and, should any one be charged with an old crime, he might plead such matter in discharge of himself); of the perjury of jurors at a former iter; of those in *misericordiâ regis*, but who had not been yet amerced; of the king's wards; his vacant churches; his estreats; his serjeanties, and purprestures on his land; of measures and weights; of sheriffs and other bailiffs who held pleas of the crown; of usurers deceased, and their chattels; of the chattels of Jews killed; of counterfeiters of the coin; of burglars, fugitives, outlaws; of those who had not made suit after offenders; of new pretended customs; of rewards for releasing distresses; of those who held plea of provors without lawful authority; of escape of thieves; of wreck; of offenders in parks; *de rapinis*

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<sup>1</sup> *Vide* vol. i., 463.

and *prisis*; of those who, having no liberty, obstructed the entrance of bailiffs on their land; of bailiffs and sheriffs giving favor, or holding plea *de vetito namio* without the king's writ, or fomenting suits, or taking bribes; of hundreds let to farm, and their value; of sheriffs and bailiffs discharging on pledges persons excused of the death of a man, for money, or imprisoning those indicted of larceny, who were by law repleviable, or raising amercements, or making unlawful distresses; of such who did not produce those they had been pledged for before the justices; of warrens made without lawful authority; of treasure trove; of felons hanged, and the value of their lands and goods. These seem to have been the principal and most usual articles to be inquired of by the jurors at this time.<sup>1</sup>

Having thus shown the manner in which business was begun in the eyre, we shall for the present take leave of it, and consider the nature of crimes, and the course of bringing criminals to justice. This will carry us to the inferior courts of the sheriff and coroners, and at length bring us back to the eyre, where these matters were finally determined.

The crime which first claims our regard is that of *læse-majesty*; which contained in it several species of offence. One of them has been before described from Glanville;<sup>2</sup> and was, when a person attempted anything against the king's life, or to raise sedition against him, or in the army, though what was designed was not brought to effect; and all those who gave aid, counsel, or consent thereto, were equally involved in the guilt. A charge of this kind might be brought by any one, even by an infant; but the party accused, in such case, was to be attached till the infant came of age. The accuser, however, must himself be no offender; for if he was an acknowledged thief, or outlawed, or convicted, or, says Bracton, *to be convicted of any sort of felony*, he was not admitted to accuse another; nor were accomplices in the guilt ever admitted to bring a charge of *læse-majesty*. The law required an accusation of this crime to be made with all expedition. A person, who knew another to be guilty, was to go instantly, says Bracton, to the king himself, if he

<sup>1</sup> Bract., 116, 116 b, 117, 117 b.

<sup>2</sup> *Vide* vol. i., 383.



could; or send, if he could not go; or to some *familiaris* of the king, and relate the whole matter. This was to be done instantly; for, according to the same authority, he was not to stay two nights nor two days in one place, nor to attend the most urgent business of his own; he was hardly permitted, says he, to turn his head behind him; and the dissembling the charge for a time by silence, made him a sort of accomplice, and betrayer of the king; and afterwards, should he prefer his accusation, he could not by law be heard, unless he could show some very good reason for his delay.<sup>1</sup>

If this charge was made upon public fame, the loss of life and the forfeiture of his inheritance followed, as in case of an appeal; though in Glanville's time it seemed to have been otherwise.<sup>2</sup> If the prosecution was by an appellor, he was to state the charge, with the time, hour, and place; and conclude, *et hoc ego, juxta considerationem curiæ, disrationare paratus sum*. Upon this the duel was awarded, if the appellee simply denied the fact; but he might, if he pleased, make certain answers, which must be determined before the duel could be awarded. He might object any of the points before-mentioned, as requisite to qualify a person to make the charge; to all which the appellor might reply, and the appeal might be decided on such collateral inquiry.<sup>3</sup>

It is made a question by Bracton, who was to sit in judgment upon and decide such points of law. Who to judge  
thereof. It could not be the king, says our author, for then he would be both prosecutor and judge; nor his justices, for they represented him. Bracton therefore thinks that the *curia et pares*, that is, the justices together with the *pares*, were to be judges in all cases of life and limb, and disherison of heir. There could be no doubt, especially since *Magna Charta*, whether the *pares regni* were to be tried by *their* peers; Bracton therefore must here be understood as speaking of commoners, to whom the *sectatores* of the county and other courts were *pares*, and judges in such courts. But these, we have seen, were never *pares curiæ* in the king's courts. And indeed the manner in which he gives this opinion is an evident mark of a different usage having subsisted, and that it was not pre-

<sup>1</sup> Bract., 118 b.<sup>2</sup> Vide vol. i., 457.<sup>3</sup> Bract., 119.

cisely agreed in what instances to recur to this ancient common-law method. This idea of Bracton might be executed by associating certain persons of the county in the commission with the justices (as we have seen was required to be done in the commission of assize),<sup>1</sup> who would be thus at once constituted *pares curiæ*. The remainder of this passage in our author, as it contains the opinion then entertained upon this point and the award of the duel, deserves notice. There was to be a distinction according to the fact on which the appeal was grounded, whether it was felony or trespass; for every trespass, says he, is not felony, though every felony contain in it a trespass. If it was a felony, then the words of the appeal were to be weighed, and the matter examined into; as whether the appellee would wage the duel, or plead some of the points above mentioned to bar the appeal; and if the duel had been waged without such examination, it might be *devadiatum*, or retracted. If it turned out to be rather a trespass than a felony, the duel was barred; and then it was to be inquired of what degree the trespass was. If it was *levis*, and the judgment would be only for a slight pecuniary penalty, the justices might judge of it without the *pares*; but if it was *gravis*, and very near to that which would have produced a disherison, and actually required a redemption to be paid, there the *pares* were to be associated to the justices, lest the king, by himself or his justices, without the *pares*, should be both *actor* and *judex*.<sup>2</sup>

At a time when offences of læse-majesty were so undefined, and accusations of that crime were large and general, it was almost always necessary to examine the matter before it went to the decision of the duel, to see whether it was a felony or a trespass only (as either of those might be an offence of læse-majesty), and whether that or some other was the proper mode of trial. The associating certain *pares curiæ*, as a check upon the justices, was a refinement which, however, does not seem to have been the established and universal practice; for the opinion is advanced by Bracton with a sort of apprehension that every one did not agree with him: *sine præjudicio melioris sententiæ*.<sup>3</sup> We see that læse-majesty was not the description of any specific offence, which was attended

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<sup>1</sup> *Vide ante*, 34.

<sup>2</sup> Bract., 119.

<sup>3</sup> *Ibid.*, 119 b.

with a punishment peculiar to itself; except that when it was also a felony, the forfeiture went to the king, and not to the lord.

Another species of læse-majesty, and that which, as it produced death, may be reckoned among the higher species, was the *crimen falsi*; at least that sort of falsification that affected the king's crown; as falsifying the king's seal in signing charters or writs; or making charters or writs, and putting forged seals thereto. Another offence which was a sort of *crimen falsi*, and which affected the king's crown, and was followed by death, was the making of false money, or clipping that which was good. This is the first mention of coining being treated as a crime of læse-majesty.<sup>1</sup>

The fraudulent concealment of treasure trove is considered by Bracton, as it had been by Glanville,<sup>2</sup> to be a high presumption against the king's crown and dignity: this was to be inquired of by the country. Treasure which was found in the earth without an owner, belonged to the king, as being *nullius in bonis*. So was *derelictum*, or *wreck of the sea*, which being thrown overboard was abandoned by the owner; though *wreck* more properly meant what was cast on shore after the destruction of a ship, where there appeared no marks by which the owner might be known, as a dog, or the like. There is no mention that an infringement of this royalty was deemed a crime of læse-majesty, though that of treasure trove was. To violate any of the laws *enacted and sworn to*<sup>3</sup> for the public benefit of the realm, was considered as a high presumption against the crown and dignity of the king; in which case there was a corporal punishment inflicted on the transgressor, as the pillory, or tumbrel, with a consequent infamy, and sometimes a pecuniary penalty and abjuration from the town where the offender lived, according to the nature of the offence, and, probably our author means, according to the particular directions of the act which had been violated:<sup>4</sup> though it may be observed, that it does not appear to have been usual in those times, nor long after, to affix in the body of an act, these or any other *specific* punishment to the breach of it.

The crime of homicide partly concerned the king,

<sup>1</sup> Bract., 119 b.

<sup>2</sup> Vide vol. i., 383.

<sup>3</sup> *Leges statutes, et juratores*.

<sup>4</sup> Bract., 120.

whose peace was infringed, and partly, as Bracton expresses it, the person who was killed. Homicide might be committed from four causes; it might be *ex justitiâ*, *necessitate casu*, or *voluntate*. The first was when any one was killed by sentence of a court, and in the forms of law; which was so far from an offence, as to be highly justifiable; though it became an offence, if the due order and course of the law was not observed. Homicide by necessity was, when it was inevitably necessary to kill the party, in order to defend one's person and property; for if the necessity was not inevitable, the fact was accompanied with the guilt of homicide. Accidental homicide, or *per infortunium*, was, when a stone was thrown at a bird, or some other animal, and a person passing by unexpectedly was struck and killed by it; or when a tree, which was cutting down, fell upon somebody. But here a distinction was made between a lawful and an unlawful act; as, if the stone was thrown towards a place where people were accustomed to frequent, or not; if a person when cutting down the tree, called out, and gave notice, in proper and reasonable time, for any one to escape. So if an act was, in the common course of things, lawful and proper; as if a master did not exceed the usual bounds in correcting his scholar, whatever was the event, no homicide could be imputed. If the act was unlawful, or, being lawful, was done without due caution, it would be imputed as a crime. Voluntary homicide was, where any one, of certain knowledge, and by a premeditated assault, in anger, or hatred, or for gain, killed any one, *nequiter et in felonîâ*, against the king's peace. This crime was sometimes committed in the presence of others, sometimes without any one seeing it, and then it was called *murdrum*, as in Glanville's time.<sup>1</sup>

It was held at this time, that if, after the foetus was formed and animated, any one struck a woman and so caused an abortion, or even if anything was given to procure an abortion, it was homicide. If a quarrel ensued between several persons, and one was killed, though the person who struck the blow was not known, yet they who held him while he struck, those who came with a bad intention, and even those who only came to counsel and

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<sup>1</sup> *Vide* vol. i., 460.

assist, were all guilty of homicide; nor was he deemed entirely guiltless who could have rescued the deceased from death, and neglected so to do.<sup>1</sup> It was held, that an infant and a madman should be excused from the pain of homicide.<sup>2</sup>

In the two following cases the law is thus laid down by Bracton. If a man killed a thief by night, the party killing would not be liable to any punishment, provided he could not have saved himself without so doing. If a person killed one who was a *hamsoken*, as they then called it, that is, a housebreaker, and the killer was standing on his defence, he was not to be prosecuted.<sup>3</sup>

As a person committed felony in killing another, so might he commit felony in killing himself; and this was called *feloniâ de seipso*. Thus, if a person charged with a crime, as one taken for homicide, or in manifest theft, or outlawed, or, in short, apprehended for any crime, and through fear of its consequences, killed himself; such a person was considered as corrupted in blood, for it was taken as amounting, in effect, to a conviction. But those who laid violent hands on themselves, when under no charge for any offence, were not to forfeit their goods nor inheritance like the former, because, as there was no precedent felony, there could not be a constructive conviction; though, says Bracton (in contradiction, as it should seem, to what went before), if a person *tædio vitæ, vel impatientiâ doloris*, killed himself, however his inheritance might be saved, he yet forfeited his movables. Again, if a man in the endeavor to do some hurt to another, killed himself, the felonious design he meditated against another would be punished in himself, and his inheritance was by law forfeited. Should a madman or an infant commit any felony *de seipso*, they were exempted from all sorts of forfeiture, unless, indeed, a madman did the fact in some lucid interval.<sup>4</sup>

Having said thus much of the crime of homicide, we shall make a little digression to examine the method directed by the law to be pursued on the death of a man, in order to bring the offenders to justice. The principal agents in this were the *coroners*, who were properly so called, from the part they took in

<sup>1</sup> Bract., 120 b, 121.<sup>2</sup> Ibid., 136 b.<sup>3</sup> Ibid., 144 b.<sup>4</sup> Ibid., 150.

the prosecution of those offences which concerned the *coronam regis*. It was the duty of the coroners, as soon as they were called upon by the king's bailiff, or some good men of the country, to go to the body of the deceased in all cases, whether the death was occasioned by a wound; by drowning, by suffocation, by accident, or by whatsoever cause, if it was a sudden death; and as they went thither, they were to command the four, five, or six next towns to appear before them, and upon their oath make inquisition concerning the death. They were to inquire how the death happened, who were present, who were principals, who were any ways assisting or consenting thereto. Those who were in this manner found guilty, were immediately, if present, to be delivered to the sheriff, and committed to prison; and all those who were found in the house with the deceased, though not guilty, were to be attached till the coming of the justices, and their names enrolled in the coroners' rolls. If the body was found in a field, the finder, in like manner, was to be attached. They were to inquire whether the deceased was known, where he lodged the last night, and the host and all his family were then likewise to be attached. If any one fled on account of the death, and was suspected of being guilty, the coroners were to go to his house and inquire what chattels, corn, and land he had, and cause it all to be appraised, and delivered to the township, which was to answer for the value thereof before the justices. After all this, and not before, the body might be buried; and if it was buried without such inquisition and view of the coroners, the whole township was to be *in misericordia*. If a person was drowned, the boat out of which he fell was to be appraised; and, in all cases, the thing which was the *causa mortis* was to be valued, and forfeited as a *deodand* to the king. Even if the inquisition did not find it to be felony, but sudden or accidental death, yet the finder, with all who were in his company, were to be attached till the coming of the justices.<sup>1</sup>

It was the business of the coroners to make like inquisition concerning treasure trove. If any one was charged with being the finder, or if a presumption was raised by expensive living, or otherwise, such person was to be at-

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<sup>1</sup> Bract., 121 b, 122.

tached by four or six pledges, and more, if they could be had. Again, in case of *raptus virginum*, if it was followed up with those circumstances of instant prosecution that are mentioned before from Glanville,<sup>1</sup> the coroners, to whom the complaint was made, were to attach the offender by four or six pledges, or, if there were no very strong marks of presumptive guilt, only by two.<sup>2</sup>

The coroners had a like office in appeals *de pace et plagis*. They were in the first place to inspect the wound, and if it was mortal, and the appellee could be found, he was to be taken and detained till the party recovered; and if he died, to be thrown into prison: but in the former case, the appellee might be attached by four, or six, or more pledges, according to the degree of the wound; and if it was a mayhem, certainly by more, that the security might be good; if he was a stranger, or could find no security, the gaol, says Bracton, was to be his pledge. The size of the wound, its length and depth, were to be measured, and that, together with the part of the body, and the arms it was made with, the coroner was to see described on a roll, with the attestation of the sheriff, if the inquisition was taken in his presence, or in the county.<sup>3</sup> Thus the coroners were the first spring in criminal prosecutions that were brought by appeal.

To return to the prosecution for homicide. If persons were committed to prison for the death of a man, they could be delivered only in one of Imprisonment  
and bail. these three ways: they might be discharged on pledges by the king's command; they might be delivered by judgment of acquittal; or, if they were clerks, they might be claimed by the ecclesiastical power. The way in which the king might deliver them was by the proceeding on the writ *de odio et atia*, which was mentioned in the observations upon *Magna Charta*.<sup>4</sup> This was a writ commanding the sheriff *per probos et legales, etc., inquiras, utrum A., etc., reatus, vel appellatus sit, etc., odio et atia, vel eo quod inde culpabilis sit, etc.* Upon the return of guilty, he was not to be discharged on bail; but if it was returned that he was imprisoned *odio et atia*, he was bailed till the coming of the justices. This was affected by another writ to the sheriff: *Præcipimus, etc., si A., etc., inve-*

<sup>1</sup> Vide vol. i., 461.    <sup>2</sup> Bract., 122.    <sup>3</sup> Ibid., 122 b.    <sup>4</sup> Vide ante, 47.

*nerit tibi 12 probos et legales homines de com qui manucapiant habendi eum ad primam assisam, etc., tunc eum* TRADAS IN BALLUM *illis 12 probis, etc.* If the bailiff of a liberty would not admit a person to bail according to the sheriff's direction, there issued a writ to the sheriff commanding him, *non obstante libertate*, to enter and make deliverance himself.<sup>1</sup>

If a clerk imprisoned was demanded by the ordinary, he was to be instantly delivered, without any inquisition being taken; he was not, however, to be let loose upon the country, but to be kept in safe custody, either in the prison of the bishop, or, if the ordinary pleased, in that of the king, till he had purged himself from the offence with which he was charged, or had failed in making his purgation, and had been accordingly degraded. Sometimes the ordinary would not put a clerk to purge himself, unless a fresh charge was brought in the ecclesiastical court; in such case, a writ might be had to require him to proceed therein.

These were two of the ways in which a person imprisoned for homicide might be delivered; the third was by judgment of acquittal, which needs no explanation. In all other cases, the law was, that persons might be discharged on bail; and even in these cases the sheriff had such a discretion allowed him, that the liberty of persons charged with crimes depended wholly upon him. He was to judge, from the nature of the fact, the person's circumstances, character, and the like; and accordingly, as he thought fit, was to commit to prison, or admit to bail. This became peculiarly hard from a piece of law then prevailing, namely, that breach of prison, however small the offence for which the party was committed, and though he was innocent, should be punished capitally; and this is one instance in which the law gave an entire indemnity to any of the accomplices who would discover the design.<sup>2</sup>

In the above cases, we have supposed the offenders were all forthcoming; but when they absented themselves immediately after the fact, the process was to raise *hutesium*, or hue and cry, and a *secta* or suit was made after them from town to town till they were taken, otherwise

<sup>1</sup> Bract., 122 b, 123 a, b.

<sup>2</sup> Ibid., 124.



the township, where the fact happened, would be *in misericordiâ*. This hue and cry and suit was made in a different way, according to the custom of different places.<sup>1</sup> The suit was to be carried further than the search from town to town, for the offender was to be proclaimed in the county; a method which had been adopted in mercy to the absent fugitive, who, it should seem, by the old law was considered as an outlaw upon his flight merely, without being proclaimed with this formality in the county court.<sup>2</sup> The law now was, that sentence should not be pronounced against the party till suit was made in this manner in the county court, Of outlawry. and he had had this warning to appear and purge himself. The time given for this was the space of five months; that is, he was to appear at the fifth county court, to answer for the offence with which he was charged; and if he did not, then he was adjudged an outlaw, and suffered all the consequences of such a sentence. If he appeared before that period, he saved the forfeiture of his land, but still forfeited his goods, on account of his flight, notwithstanding he might be innocent of the crime.

But the criminal could not be prosecuted to outlawry in this way, unless a person stood forth to make the suit, who could speak *de visu et auditu* that the party had fled; and who would call upon him to return in the king's peace, or require that he might, at the proper time, be outlawed; and then he was to state the crime, as if the party was present, and the appeal was going to be heard; and he was to add, that should he appear, he would repeat the charge he had made. Thus not only *suit*, but the *appeal* was actually to be made, before the fugitive could be outlawed.<sup>3</sup>

It should here be recollected, that a *suit* and *appeal*, when for homicide, could not be prosecuted by every one, but only by one who was of the blood of the deceased; and that the nearest was preferred to the more remote. Yet some strangers were admitted to make *suit*; as one who was bound by homage to the deceased; or if he was of the *manupastus*, or family of the deceased person, or could say that he had received at the time of the killing

<sup>1</sup> Bract., 124.<sup>2</sup> Ibid., 125.<sup>3</sup> Ibid., 124.

any wound, or restraint, or the like. A minor might make suit, and appeal; but a woman, as we have before seen from Glanville and *Magna Charta*,<sup>1</sup> could not have an appeal except *de morte viri inter brachia sua interfecti*, as Bracton expresses it. It should be observed, that suit could not be made by attorney, if the party was able himself to prosecute.<sup>2</sup> If a sheriff proceeded to demand any one, without a person appearing to make suit, or without the command of the justices (who, we shall presently see, could make suit for the king in case of any intermission by the appellor), he was *in misericordiâ*.

Respecting the persons who might be outlawed, every male who was twelve years old might be outlawed, because a person of that age ought to be in some *decenna*, or, which answered the same purpose, in some *manupastus*; but those of inferior age, as they were not *sub lege*, could not properly be ever said to be outlawed, or put out of the law: the same of a woman, who, as she also was never *in laughe*—that is, in frankpledge, or in a *decenna*, could not be outlawed; but if she fled upon commission of any felony, she might be *wayviata*, as they called it—that is, be esteemed as one deserted and forlorn, which condition corresponded with that of outlawry.

The time necessary to complete the outlawry was this: the offender was to be demanded at four counties, from county to county, till he was outlawed; but at the first county there was only to be what they termed *simplex vocatio*; and that was not computed towards the time as one of the four counties; so that in truth five were to pass before the outlawry was had; the outlawry therefore was to be at the fourth of those after the *simplex vocatio*. At the fifth, or, as they called it, the fourth county, no *essoïn* or excuse could be received, nor was it sufficient that any one would engage to produce him at the next county; for this would be protracting the time of outlawry *ad infinitum*. But at any of the preceding counties, an engagement to produce the fugitive would be admitted till the fifth county; and the fugitive had till the fifth county to render himself to prison, or defend himself and purge his innocence; but after that time the outlawry stood in the way, and he could not return till that was removed by the mercy of the king.

<sup>1</sup> *Vide* vol. i., 461; *ante*, 47.

<sup>2</sup> Bract., 124.

If there was any delay in making the suit, as if hue and cry had not been raised, if the party had not been pursued from town to town, nor to the sheriff, nor to the coroner, nor at the first county; yet if a person chose to commence the suit afterwards, he might, as there was no one who had any right to object such deficiency in the proceeding. Again, if the suit had been begun in time, but a county court was suffered to pass without continuing it, the suit might, nevertheless, be resumed, so as the lapsed county was not reckoned towards the time of computing the outlawry; and so of any greater omission, which, if rectified, was always done with a view rather to favor the appellee than to oppress him. If upon any of the like failures of suit it was not again resumed, the county had no power to proceed to outlawry, but they were to wait for the coming of the justices, whose office it was, among other things, to give direction to the sheriff to proceed to outlawry, *ex parte regis*, in default of the appellor. Thus could the justices command the sheriff to proceed to outlawry, where there was any slackness in the party who had commenced the suit. They might likewise, in cases where no suit had been commenced by an appellor, command the sheriff to proceed to outlaw a person charged before them of any crime; but this could not be done till an inquisition had been taken, to try whether he was guilty or not. If the inquisition found him guilty, then the sheriff was commanded to proceed; otherwise, no direction was given about it. The sense of this was, that a reasonable presumption of the party's guilt should be raised before he was made liable to the penalty of an outlawry. The presumption founded upon a suit commenced, though intermitted, was thought sufficient to warrant the justices to direct a continuance of it; and if no suit had been commenced, a sufficient presumption was raised in this manner by the verdict of an inquisition.<sup>1</sup> This was the course in which criminals might be prosecuted at the king's suit, in default of the suit of the party.

If the due order and formality was observed in proceeding to outlawry, it could be removed no otherwise than by the king's pardon, even though there should after-

<sup>1</sup> Bract., 126.

wards appear to have been no crime committed, as if the person supposed to be killed should be produced alive. But should any of the necessary requisites towards the outlawry be wanting, it became void. Many were the instances in which this might happen. An Reversal of outlawry. outlawry was void if it had been without suit, or without a continuance of the suit, if it was proceeded in after the iter of the justices, without authority from them; or if it was commenced at the suit of the king, without a previous inquisition; if it was pronounced anywhere than within the county; supposing it for London, if it was pronounced out of the husting; if the offender died before the outlawry; if the person supposed to be killed appeared alive before the outlawry pronounced; if the prosecutor died before the outlawry pronounced; if the accused had answered for the same offence in some other county; if he had surrendered himself to prison before the outlawry; if he had submitted to banishment by consent of the king; if the outlawry was pronounced before the legal time was elapsed; if he was under twelve years of age; in all such cases the outlawry would be declared void, upon the accused coming in to stand a trial for the offence.<sup>1</sup>

Processes of outlawry lay in every case which was charged to be against the king's peace; but not in matters which concerned the sheriff's peace only.<sup>2</sup> Outlawry lay not only against those guilty of the *fact*, or, as they are more commonly called, principals, but also against those guilty of *force*, or, as they were afterwards called, accessories; and if neither of them appeared, the proceeding would be against both at the same time; only, at the last county, judgment was first to be pronounced against the principal, and then against the accessory, on the same day. Some thought it ought not to be even on the same day; and others said that the accessory was not even to be demanded till the principal was first convicted. But Bracton thought that, should they both fly, they ought to be proceeded against together, as above mentioned; only, should the accessory appear alone, then indeed he was not to be proceeded against till the principal was convicted, because, by his appearance, a presumption was raised of his innocence.

<sup>1</sup> Bract., 127 a, b.

<sup>2</sup> Ibid., 127 b.

When a person was outlawed, every one who knowingly fed, received, or harbored him was subject to the same penalty as the outlaw himself; for which reason an outlaw had in earlier times been called a *frendlesman*; one who could not, by law, have a friend. An outlaw was said *caput gerere lupinum*, by which it was not meant that any one might knock him on the head, as has been falsely imagined, but only in case he would not surrender himself peaceably when taken; for if he made no attempt to fly, his death would be punished as that of any other man, though it seems that, in the counties of Hereford and Gloucester, in the neighborhood of the marches of Wales, outlaws were in all cases considered literally as *capita lupina*.<sup>1</sup> If an outlaw returned without the king's pardon, he might be executed without further legal inquiry; for, says Bracton, *Justum est judicium, quodd sine lege et judicio pereat, qui secundum legem vivere recusat*.<sup>2</sup> An outlaw forfeited everything he had, whether it was in right or in possession; all obligations and contracts were dissolved, and all rights of action; and, like a judgment of felony, it operated with a retrospect to make void all gifts and sales made after the felony committed. The manner in which the forfeiture was distributed was this: all chattels went to the king; the lands were taken into the king's hands for a year and a day, and after that (unless holden *in capite*) they reverted to the lord of whom they were holden. The king's year and day had grown into a regular casualty, in lieu of the singular species of punishment he might inflict by destroying houses, gardens, and meadows; and even the year and day used sometimes to be released upon the lord's paying a fine.<sup>3</sup>

When a person had been outlawed according to all the forms of law, he could only be restored, as was said before, by the king's pardon, and that restored him only to the king's peace, so as to enable him to appear without hazard to his person; all the forfeitures remained, and every other consequence of the outlawry. For though the king might remit his own claims, he could not release or disturb the interest of others.<sup>4</sup> This pardon, however, as it only removed the outlawry, still left the party to be

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<sup>1</sup> Bract., 128 b.<sup>2</sup> Ibid., 129.<sup>3</sup> Ibid., 129.<sup>4</sup> Ibid., 131, 132 a, b.

proceeded against by the appellor for the offence with which he was charged.<sup>1</sup>

In such instances, where the king would have pardoned a conviction of the fact, he would readily pardon the outlawry, as in case of homicide *per infortunium*, or *se defendendo*; and in general where there was no offence committed. Process of outlawry would not lie against a clerk, any more than judgment of death.<sup>2</sup>

We have hitherto spoken of such homicide as had been committed in the presence of persons, who could testify concerning it. There was another degree of homicide, which was when any one was killed *nullo sciente vel vidente, præter solum interfectorem et suos coadjutores et fautores, et ita quod statim assequatur clamor popularis*; this was called *murdrum*, and had been described in the same manner by Glanville.<sup>3</sup> In this case it was presumed, according to the law of William the Conqueror, that the party killed was a Frenchman, unless *Englischery* — that is, his being an Englishman — was proved by the relations, and presented before the justices.<sup>4</sup>

There were many cases where a county was excused from paying a fine for this *murdrum*. One was where the killer, whether taken or not, was known; for then the felony might be prosecuted, either by suit or inquisition, to outlawry; much more if the killer was taken, for then he might be punished; so, if the party survived some days, for he might discover the offender, and declare whether he was an Englishman or a Frenchman; if any had fled to a church for the death, and had confessed it; so where the person was killed *per infortunium*, as by suffocation, drowning, or the like accident, though in some places the custom was otherwise. In all cases but the preceding, if the killer was not known (whether the person slain was English or not) a *murdrum* was to be paid, unless *Englischery* was duly presented. This presentment was made inquisitions of the death. The proof was different in different counties; in some, the fact was presented by two males on the part of the father, and two females on the part of the mother, of the nearest of kin to the deceased; in some counties by one of each; in others differ-

<sup>1</sup> Bract., 133 b.<sup>2</sup> Ibid., 134 b.<sup>3</sup> Vide vol. i., 460.<sup>4</sup> Bract., 134 b.

ently. The names of these persons were to be enrolled in the rolls of the coroners, and to be presented before the justices itinerant. If there was any doubt, either of what the relations alleged, or whether they were related to the party, the *Englshery* was to be declared *per patriam*.<sup>1</sup>

If an offender fled to a privileged place, he might either surrender himself to justice, or abjure the realm of England. If he chose the latter, a certain number of days were to be allowed him to reach any port he should choose, to which he was to make the best of his way, never leaving the king's highway, nor delaying two nights at a place; but he was to keep on, so as to arrive at the port within the stated time, and transport himself as soon as possible. Before he set out he was to bind himself by an oath, taken before the coroners or the justices, that he would leave the kingdom of England, and never return to it but by permission of the king. This oath ought to be taken within forty days from the offender's first going to the privileged place, that being the space of time allowed by the law to sanctuary persons, and particularly prescribed by the Constitutions of Clarendon,<sup>2</sup> as the period within which persons acquitted by the ordeal should abjure. However, if the person flying to sanctuary would not leave it at the appointed time, he could not be removed from thence by lay hands; but it rested with the ordinary of the place to remove him, if he thought fit. Should the bishop scruple to infringe the privilege of sanctuary (a scruple which could very rarely be removed in the mind of a churchman), there remained nothing but to starve him out.<sup>3</sup> Thus stood the law of sanctuary and abjuration.

If a person was in custody for a felony, he was not to be stripped immediately of his goods and chattels, but as soon as he was taken, they were to be appraised by the guardians of the pleas of the crown, the bailiffs, and other lawful men, and to be safely kept by the bailiffs till the prisoner was either convicted or acquitted. In the meantime, he was to have the use of them to provide himself with necessities; and if they were taken from him, he might have a writ, commanding the sheriff to see it ordered in the above manner. It was a rule that a prisoner should

<sup>1</sup> Bract., 134 b, 135 a, b.<sup>2</sup> *Vide* vol. i., 317.<sup>3</sup> Bract., 135 b, 136.

not be brought before the justices *legatis manibus*, with his hands tied; though sometimes, to prevent escapes, they might bind his feet.<sup>1</sup>

Having thus brought the prisoner into court, the next step would be to state the words of the appeal, with the defence of the appellee, and the joining issue on the fact, and going to trial; but before we come to speak so particularly of this proceeding, it will be proper to premise somewhat concerning the alterations which had taken place during this reign in the modes of trial in criminal inquiries. The trial by ordeal had continued till the judgments of councils<sup>2</sup> and the interference of the clergy at length prevailed against it. In the third year of this reign direction was given to the justices itinerant for the northern counties (and probably to the others likewise) not to try persons charged with robbery, murder, or other such crimes, by fire and water; but, for the present, till further provision could be made, to keep them in prison under safe custody, so, however, as not to endanger them in life or limb; and for those who were charged with inferior offences, to cause them to abjure the realm.<sup>3</sup> What further provision was made, as thereby promised, does not appear (a); but we find this

Ordeal goes  
out of use.

(a) There was no statutory enactment, but (as Dr. Lingard states) the judges, of their own authority, adopted a practice which had been creeping into the criminal courts ever since the proof of innocence by compurgation had been abolished under Henry III. When a prisoner found himself incapable of battle, or was afraid of the trial by battle, he would solicit, and sometimes purchase of the crown, permission to put himself upon his country, that is, to have the question of fact determined by inquest, of the jurors of the court, as was generally done in civil suits (see instances in *Rot. Curiae Reg.* of Richard I. and 1 John, vol. i., 204; ii. 30, 97, 121, 173, 230, 245). On these occasions the accused often pleaded that the charge was founded in malice and hatred, and asked that the jury might inquire, "*utrum atia sit vel non.*" It had been hitherto a favor, which depended on the discretion of the judges; but now it was offered to all, and was gladly accepted by most. The accused had, indeed, the right of rejecting it; but if he did, and refused to plead before a jury, he might be remanded to prison, and be made to suffer the *peine forte et dure*, (*Lingard's Hist. Eng.*, ii., c. 6.) For this latter part of the statement, the learned writer cites no authorities, except the entries in the rolls already quoted — entries of prisoners putting themselves on the country, which do not support it. It is certain, however, that in Alfred's time there was trial by jury in criminal cases, and equally certain that jurors, in those days, were witnesses; and that if there were no witnesses, as there could hardly be in many criminal cases, as murder, there could be no trial by jury, and therefore the ordeal was resorted to, in default of

<sup>1</sup> Bract., 136 b, 137.

<sup>2</sup> Dec. pars. 2, caus. 2, quest. 5, c. 20.

<sup>3</sup> Dugd., *Ori. Jur.*, 87.



order of council had such an influence towards abolishing this superstition, that it went quite out of use by the time of Bracton, who makes no mention of it in his book (a).

witnesses. On the other hand, if there were witnesses (in which case the accused might prefer the ordeal), it does not appear whether trial by jury was enforced, or whether the accused had an option. The question, however, as to the enforcing of trial by jury in all criminal cases, appears to depend upon a consideration overlooked by the learned historian just quoted, viz., Whether or not, at this period, trial by jury had ceased to be mere trial by witnesses, and had become a trial by the jurors upon the evidence; for, if not, it is difficult to see how the trial by jurors could be enforced in all cases, *i. e.*, in cases where there were no witnesses. For so long as jurors were witnesses, there could be no trial by jury where there were no witnesses. It rather appears that, at this period, jurors had not ceased to be witnesses; and therefore there is reason to doubt whether the learned Lingard is right in supposing that, at this time, trial by jury was directly enforced in all cases; nor do the entries on the rolls he refers to appear to support such a conclusion, as they only show that there was trial by jury allowed. It was quite another thing to enforce it; and of this there is no evidence. The ancient usage, as stated by the author a little further on, was to give the option to a prisoner to be tried "by God"—*i. e.*, the ordeal—or "your country," which meant a jury; and this supports the view that trial by jury was allowed in criminal cases, as it was in the reign of Henry II. in civil cases, and also seems to show that trial by evidence was gaining ground. It would appear, indeed, that under the ordinance now in question, some inquiry must have been made by means of evidence; and there is no doubt it was an indirect way of coercing prisoners to put themselves upon the country, by keeping them in prison until they did so. This view is supported by a passage in the *Mirror—temp. Edward I.*—which complains that the people were not allowed the trial by the miracle of God, as the ordeal was called.

(a) There can be no doubt that trial by jury very gradually superseded every other mode of trial. The trial by jury which was mentioned by Glanville, in the reign of Henry II., as *jurata patriæ sive visneto* (*Glan.*, lib. ix., c. xi.; vii., c. xvi.; v., c. iv.), and in his time allowed as real actions at the election of the defendant, was afterwards so much approved of, that suitors were led to adopt the same course of proceeding by mutual consent, or by advice of the court, as Glanville says: "*Tunc eo consensu ipsarum partium tunc etiam de consilio curiæ*" (lib. xiii., c. ii.). And instances of it are to be found on the rolls (see *Placit. Abb.*, 140; *Brac.*, 147); and in the time of Bracton it had become the most ordinary method of deciding questions of fact.

It is, however, abundantly manifest that at this time jurors still continued to be only witnesses, and to find their verdicts, as Bracton often explains, only upon what they have themselves known, and heard, or seen. Thus, in the reign of Richard I., the jury found a special verdict in these terms: "*Assisa dicunt quod numquam viderunt aliquam personam præsentari ad ecclesiam sed semper tenuerunt personæ, persona in personam ut de patre in filium, usque ad ultimam personam quæ ultimo obiit*" (*Plac. Abb.*, iii.; *Norfolk*). So in the same reign, in an assize of novel disseisin, there is this entry: "*Assisa venit recognitura si Adam de Grenville et Willielmus de la Folie dessaisaverunt injuste, et sine iudicio, Willielmus de Weston de libero tenemento, juratores dicunt, quod non viderunt unquam aliam saisitum de tenemento ille nisi Will. de la Folie.*" So, in the reign of John, there is this entry: "*Juratores dicunt quod ecclesiæ sancta Helenæ nunquam fait capella pertinens ad ecclesiam sancti Michaelis quæ est de donatio domini*

As to the trial by duel, it should seem that some direction, like that just mentioned, had been made, which gave to a party appealed an election to defend himself *per corpus* or *per patriam*; a regulation which, no doubt, was framed in analogy with the institution of the assize in lieu of the duel in a writ of right; and as in that, so here, if the appellee put himself upon the country, he could not afterwards defend himself by duel, nor *vice versâ*.<sup>1</sup>

This option of trial was not so wholly left to the party appealed, but that the justices assumed a power of control in certain cases of a very particular nature; and directed the one or the other, as it seemed to them best suited to the matter of inquiry. Thus where a person was poisoned, the appellee had no election, but was compelled to defend himself *per corpus*; because, says Bracton, the *patria* could know nothing of a concealed fact, like this, but by conjecture or by hearsay, which would be no proof, either for the appellor or the appellee. Again, some cases were held so clear, as to stand in need of neither; as, where a person was found near the deceased with a drawn knife; where a person slept in the same house with the deceased, and raised no hue and cry. In these and the like cases of violent presumption, the appellee was not admitted to defend himself either *per corpus* or *per patriam*, but such a manifest circumstance was considered as a conviction of the fact.<sup>2</sup>

In all appeals of felony it was required, that the year,

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regis, sed semper temporibus suis judicaverent illam esse matricem ecclesiam" (*Plac. Abb.*, 94; *Lanc. rot.*, iii.). "Et quod nesciunt si Willielmus de la Folie dissaisisset, cum inde vel non, consideratum est quod alii juratores elegantur qui melius sciant rei veritatem. Dies datus est eis ad diem Mercurii" (*Plac. Ab. Wilteser*). From this it appears, that if it happened that the jury did not know enough of the matter to determine it, the course was to have another. So it is laid down in Bracton, upon a question whether the plaintiff claiming to be tenant by the courtesy, had issue by his wife: "Si dicant juratores quod bene viderunt eum seysitum et postea ejectum per tenentum sed de aliquo puero nihil sciunt, quia mater obiit inpariendo, extra comitatem in remotis quia eorum veredictum insufficiens est et quia ipse ignorare possunt ea quæ fiunt in remotis, recurrendum erit ad comitatum et ad vicenetum ubi mater obiit; et ibe facta inquisitione de veritate terminetur negotium" (*Bracton*, fol. 216 a). Thus it is, that in an assize the jurors were said to recognize, that is, to declare upon their knowledge or recollection. Thus, in the reign of John, we find a jury declaring: "Quod ipse recognoverunt quod interfuerunt ubi. Ricardus de W. coram ipsis et aliis, etc., propria voluntate vendidit terram suam," etc.

<sup>1</sup> Bract., 137.

<sup>2</sup> Ibid., 137 a, b.

day, hour, and place, should be stated precisely; and it was to be charged *de visu et auditu*, upon the testimony of the party's own senses. The form of an appeal of homicide was as follows: *A. appellat B. de morte C. fratris sui, quodd sicut ipse A. et C. frater suus essent in pace Dei et domini regis apud* such a place, *faciendo* such a thing, or *transeundo* from such a place to such a place, on such a day, year, and hour, *venit idem B.* with such a one, *et nequiter, et in feloniam, et in assultu premeditato, et contra pacem domini regis ei datam, fecit idem B. prædicto fratri suo C. unum plagam mortalem in capite quodam gladio, ita quodd obiit infra triduum de plaga illa;* and then concluded thus: *Et quodd fecit hoc nequiter, et in feloniam, et contra pacem domini regis, offert se disrationare versus eum ubicunque per corpus suum; sicut ille qui præsens fuit, et hoc vidit, et sicut curia domini regis consideravit, et si de eo malè contigerit, per corpus of such a one, fratris sui, or parentis C. qui similiter hoc offert disrationare per corpus suum, sicut curia consideraverit.*<sup>1</sup> This was the form of an appeal against the principal. An appeal against an accessory, or one guilty of force, as they called it, was thus: *A. appellat B. de fortiâ, quod cum ipse et C. frater suus essent, etc., venit idem D. cum prædicto B. et cum aliis, naming them, et tenuit ipsum C. fratrem suum, quamdiu ipse B. interfecit eum; et quodd hoc fecit nequiter, etc.* After this the appellee made his defence, in this way: *Ei B. venit, et defendit omnem feloniam, et pacem domini regis infractam, et quicquid est contra pacem domini regis, et mortem, and everything charged in the appeal; and concluded with putting himself upon the country, or defending himself per corpus; et quod idem inde culpabilis non sit, ponit se super patriam de bono et malo, if he chose that trial; or paratus est se defendere versus eum per corpus suum, sicut curia domini regis consideraverit.* The appellee was compelled to name one or other of these trials; for if he had said simply, *quod velit se defendere, sicut curia domini regis consideraverit,* it would have been no defence at all;<sup>2</sup> and accordingly, we may suppose, the appeal would have been taken *pro confesso*; for the court were not to instruct him how he was to defend himself. But if he had said, *paratus sum defendere vel per corpus meum, vel per patriam, sicut curia consideraverit,* it should seem, says Bracton, that he thereby

<sup>1</sup> Bract., 138.<sup>2</sup> Ibid., 138 b.

gave up his election; and then, we suppose, the court would refer it to the more rational trial, that by jury.<sup>1</sup>

If he made choice of the trial *per patriam*, he was not to prefer the *patria* of any hundred he liked; but that was to be determined by the judge, who might assign which twelve he pleased, of those returned for each hundred. This practice was in order to guard against partiality and collusion; for, says Bracton, a man might have lived very reputably in one *patria*, and not so in another. If he had chosen the defence *per corpus*, the justices, before they suffered the duel to commence, were to examine into the circumstances of the fact, lest it might be some trifling trespass, in which the duel would not lie: a laudable caution to prevent the unnecessary hazard of life in that barbarous trial.<sup>2</sup>

But many exceptions might be made to the appeal, which would supersede the necessity of recurring to either of these trials. These were either such as were general, and were equally decisive in all appeals; or such as were specially appropriated to particular prosecutions. Of the former kind were the following: that suit had not been properly made; that the coroner's roll and the appeal made in court did not agree; that the coroner's and sheriff's rolls varied from each other; that the appellee had been already appealed and acquitted of the fact; that an iter had intervened since the fact, without any prosecution commenced;<sup>3</sup> that the appeal was brought *per odium et atiam*; that it would not lie between the appellor and appellee, being lord and tenant, or lord and villein; that there was no mention in the appeal *de visu et auditu*; that there was a variation in the name; that the appellor had once made a *retraxit* of his suit; that the appellor was a manifest traitor convict, or a thief, and provor; that the fact was not laid *de pace domini regis*, but *de pace justitiarum*, or *de pace vicecomitis*; that it was not laid to be a felony;<sup>4</sup> that the appellor was a clerk. The appeal might also be deferred for a time, by alleging the minority of either the appellor or appellee.<sup>5</sup>

If none of these exceptions could be made and sup-

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<sup>1</sup> Perhaps this might be the origin of the modern form in which a prisoner puts himself on trial,—*by God and my country*,—though now the *or* is changed to *and*; the former signifying the same as *per corpus*, which was always considered as an appeal to heaven.

<sup>2</sup> Bract., 138. b. <sup>3</sup> Ibid., 139 b, 140 a, b. <sup>4</sup> Ibid., 141. <sup>5</sup> Ibid., 141 b.

ported, the duel might be waged. We have seen in what manner a right to land was tried by duel.<sup>1</sup> We have now an opportunity of relating the method of ordering this proceeding in an appeal. When the duel was waged, the appellee first gave security to defend, and then the appellor gave security to maintain the appeal; after which the appellee took an oath, denying the matter of the appeal word for word: "Hear this, O man, whom I hold by the hand, who call yourself John by the name of baptism, that I did not kill your brother, nor gave him a wound with a sort of weapon by which he might be removed further from life, or brought nearer to death; nor did you see this, so help me God, and these holy Gospels." This was the form of swearing, with the additional circumstances of time, place, and the like. It seems very remarkable, that anything should be rested upon the sort of instrument with which a man was killed; but so it was. Bracton says, it might be laid in the appeal as done with any kind *armorum molutorum*; but not with a stick, or stone, or other weapon that could not be said to be *arma moluta*. It may be said, that Bracton states this only as an opinion held by some, *secundum quosdam*; yet he seems to give an absolute opinion, that a wound with a stick or stone would not be properly laid.<sup>2</sup>

After this, the appellor swore in maintenance of his appeal thus: "Hear this, O man, whom I hold by the hand, who are called John by the name of baptism, that you are perjured, and therefore perjured, because you wickedly and feloniously did kill C. my brother; and wickedly and feloniously, and with a premeditated assault did give him such a wound, with such a sort of weapon, that he died thereof in three days; and this I saw, so help me God, and these holy Gospels:" to which were to be added, as in the former oath, the time, place, name, and the other necessary circumstances, so as to support and cover everything charged in the appeal. After the oaths were thus taken, the appellee was to be committed to two knights or other lawful men, according to his rank, who were to lead him to the field assigned for the duel; and the appellor in like manner. There they were both to be guarded so that no one might converse with them,

<sup>1</sup> *Vide* vol. i., 329.

<sup>2</sup> Bract., 138.

till they engaged in the duel. Before they engaged, each was to swear in this manner:<sup>1</sup> "Hear this, ye justices, that I have not eat nor drank, *nec aliquis pro me, nec per me propter quod lex Dei deprimi debeat, et lex diaboli ex altari, sic me Deus adjuvet.*" After this a proclamation was made, forbidding all persons, whatever they heard or saw, to move or speak a word, upon pain of imprisonment for a year and a day; and then the appellor and appellee engaged. If the appellor was vanquished, or if the appellee defended himself the whole day till the stars began to appear, he was acquitted of the appeal; because the appellor had engaged to convict him that *day*, and had failed. He was also acquitted as against all others who had appealed him of the same fact; as were those likewise who were appealed of *force* or *command*. But if the appellee was vanquished, he suffered capitally, and forfeited everything from him and his heirs, as was before stated in case of outlawry. Should the appellor, when he came into the field, make a *retraxit* of the appeal, he was to be sent to gaol, and he and his pledges of prosecuting the duel were in *misericordiâ*. But it was otherwise, if he was vanquished; for though he was to be sent to gaol, he was generally pardoned the *miseri-cordia*, in consideration that he had engaged in maintenance of the king's peace.<sup>2</sup>

After the principal was convicted, they might proceed to the duel against the accessory. This might be the next day. Or, if the accessories had not been yet appealed, they might then state an appeal against them, and proceed in like manner as before mentioned in case of principals; and the accessory, if convicted, would suffer, as the principal, according to the maxim, *satis occidit qui præcipit*. If anything happened which prevented the appeal against the accessories, the king might take it up *pro pace suâ*; and then the trial would of necessity be *per patriam*; for the duel could not be waged against the king. There were other instances where the duel could not be waged; as, when the appellor was a woman; when the appellor had been maimed, or was above sixty years old; though in this last case he had his election.<sup>3</sup> We have seen, in Glanville's time, that there was a different judgment, when the offender failed to purge himself *per legem*, and

<sup>1</sup> Bract., 138.<sup>2</sup> Ibid., 142.<sup>3</sup> Ibid., 142 b.

when he was vanquished in the duel.<sup>1</sup> A similar difference seems to have subsisted at this time; for when the king pursued an appeal *pro pace suâ*, and convicted the party by the inquest, Bracton doubted what was to be the punishment. Some thought it was to be capital, as it would have been if the appeal had gone on at the suit of the party; others thought, that it was to be only a pecuniary penalty; and yet, where a woman convicted a man of a rape *per patriam*, he suffered as upon an appeal in other cases.<sup>2</sup>

We have hitherto been treating of a prosecution when a person chose to stand forth as accuser, and when the king carried on the suit, on the omission or failure of such person in continuing it. It remains now to say something upon the other mode of prosecution, which was when a person was indicted *per famam patriæ*. This was probably no other than the *fama publica* mentioned by Glanville;<sup>3</sup> which raised a presumption Proceeding per famam patriæ. amounting to a conviction, till the party had purged himself from the suspicion thereby thrown upon him; for this, like other presumptions, was open to a proof or purgation to the contrary. The *fame* which was sufficient to raise this presumption, ought to be such as was entertained by good and grave men, who deserved credit, and not the flying reports of common conversation. Thus, as a person indicted *per famam patriæ* was charged by the *patria*, or twelve jurors, elected in the manner before mentioned, who had founded the accusation upon their own knowledge or persuasion, collected from observation or report; it became the judge, if he had any doubt, or suspected the jury, to make strict examination into the matter, and ask the twelve how they learnt what they in their verdict declared concerning the person indicted; and upon their answers he might judge whether the charge was founded in truth or malice.<sup>4</sup> Perhaps, says Bracton, some of the jurors might say, that they collected their information from one of their brother-jurors; who, upon being interrogated particularly, might say he had it from such a one, and so on, till it was traced to some disreputable person, who deserved no credit. It often happened that these examinations brought to light the iniquity of

<sup>1</sup> Vide vol. i., 394.    <sup>2</sup> Bract., 143.    <sup>3</sup> Vide vol. i., 457.    <sup>4</sup> Bract., 143.

a charge. It sometimes turned out that an imputation of a crime was contrived to be thrown on a freeholder by his lord, in order to get an escheat; sometimes by a neighbor from other malicious motives.

When this examination had been made in order to proceed to taking the verdict, and giving judgment thereon with more security, then the judge was to inform the party indicted, that, if he entertained suspicion of any of the jurors, he might have them removed; for, if no objection was made to any of them, when the twelve jurors<sup>1</sup> appeared, they were all sworn, either singly, or all together, as follows: "Hear this, ye justices, that we will speak the truth of that which you shall require of us on the part of our lord the king, and in nothing will we omit to speak the truth; so help," etc. After which one of the justices gave them the matter in charge in this way: "This man, who is here present, charged with such a crime, comes and defends the death and everything with which he is charged, and puts himself thereof upon your tongues, *de bone et malo*; and therefore we charge you, by the faith by which you are bound to God, and by the oath you have taken, that you make known to us the truth thereof; nor do you omit, through fear, love, or hatred, but that, having God before your eyes, you declare whether he is guilty of that with which he is charged, or not guilty; and do not bring any mischief on him, if he is innocent of the crime." According to the verdict given by the jurors, the party was either delivered or condemned.

The form in taking an inquest *per patriam* was to be observed by the justices in all cases, where a party, as in the above-mentioned instances, had put himself upon an inquest. Whenever the justices suspected the charge to be true, and that the jurors, through fear, or love, or malice, were inclined to conceal the truth, they might, if they pleased, separate them one from the other, and examine them apart, in order to sift out the real truth of the matter.<sup>2</sup>

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<sup>1</sup> It seems from the manner in which Bracton expresses himself, as if, in cases of killing, the four townships which had appeared before the coroners were joined with the jurors of the *patria*, and must concur with them in their verdict. Bracton says, that any of the townships might be challenged, the same as the other jurors. Bract., 153 b, 154 a. *Vide ante*, 268.

<sup>2</sup> Bract., 143 b.



Here then do we see the office of the twelve jurors chosen out of each hundred at the eyre; they were to digest and mature the accusations of crimes founded upon report, and the notorious evidence of the fact; and then, again, under the direction of the justices, they were to reconsider their verdict, and upon such review of the matter, they were to give their verdict finally. Again, wherever any circumstance rendered it unlawful or impossible that the duel should be waged in an appeal, the truth was inquired of by these jurors; and we may suppose, that in all other causes in the eyre, whether civil or criminal, where a matter arose that was to be tried by a jury, it was referred to one of these juries who attended there on the business of the county. It may be collected from a single mention of purgation by Bracton, that a person charged *per patriam* might purge himself, as formerly,<sup>1</sup> or put himself on the country, as before mentioned.

Now have we finished all that can be said concerning an appeal of death. There were several other cases of personal injury, where an appeal was the usual mode of prosecution. One of these was *de pace et plagis*, as they called it. The form of this appeal was, *A. appellat B. quòd* such a day, *sicut fuit in pace domini regis* in such a place, *venit idem B. cum vi suâ, et contra pacem domini regis in felonîâ, et assultu premeditato fecit ei insultum, et quandam plagam ei fecit* in such a part, with such a sort of arms; *et quòd hoc fecit nequiter, et in felonîâ, offert probare versus eum per corpus suum, etc.*, as in the before-mentioned appeal. To this the appellee made his defence: *Et B. venit, et defendit pacem domini regis infractam, et feloniam, et plagam, et quicquid est contra pacem domini regis*, and so on, denying the whole appeal *per corpus suum secundum quod curia consideraverit*. In this there might be the same general exceptions made, as were stated in case of homicide; as, that suit was not made before the sheriff and coroners, and the like. The appellee might have his option, whether to defend himself *per corpus* or *per patriam*, except in some few cases, where the trial by duel was not allowed; as, if it was not a *plaga*, but only a bruise; and for that purpose the party was to be inspected and examined; for

Of other  
appeals.

<sup>1</sup> *Vide ante*, 293.

if it was not a *plaga*, it was only a trespass, and no felony.<sup>1</sup> In like manner, if it was not laid *armis molutis*, but if it was done by a stone or stick, in this appeal, as well as in that of homicide, as we before observed, they could not decide it by duel; for these weapons, says Bracton, made only a bruise, and not a *plaga*, or wound.<sup>2</sup>

Another appeal for a personal injury, more aggravated than the foregoing, was that *de plagis et mahemio*; which appeal was stated much in the words of the former: *A. appellat B. quòd cum esset in pace domini regis in such a place, etc., venit idem B. cum vi suâ, et in felonîâ et assultu premeditato, etc.*, as in the former, *et fecit ei quandam plagam in capite, ita quòd mahemiatus est; et quòd hoc fecit nequiter et in felonîâ, offert probare versus eum, sicut homo mahemiatus, prout curia dom. regis consideraverit*: and the defence, *Et B. venit, et defendit, etc.* The first step to be taken was for the justices to inspect the wound, to see if it was a mayhem; and if it was, the appellee was constrained to defend himself by the country; for it would be a double injury to oblige the appellor to engage in the duel. A mayhem was defined to be, when a man was rendered, in any part of his body, unfit for fight; as if a bone was extracted from the head; if any bone whatsoever was broken; or the foot, hand, or finger, or joint of the foot or hand, or any other member was cut off; or if the sinews or any member were contracted, or the fingers crooked, by a wound; if an eye was beat out; in short, if any hurt was done to a man's body that rendered him less able to defend himself. Bracton thought, that breaking out the teeth was a mayhem, if they were the front teeth, because it disabled, in some measure, from fighting; but not so of the others. Castration was a mayhem, though an injury out of sight, and causing no outward disfiguring. There were some mayhems which were not a bar to the appellor engaging in the duel; as where an ear or a nose was cut off; this, though a disfiguring, not being such as would disable him from sustaining the duel. There lay in this appeal the same objections concerning the wounding and weapons, as in the former.<sup>3</sup>

The next appeal, grounded upon a personal injury, is what they call *de pace et imprisonmento*; which was, where

<sup>1</sup> Bract., 144.

<sup>2</sup> Ibid., 144 b.

<sup>3</sup> Ibid., 145.

a free man was taken and imprisoned against the king's peace. The words of the appeal were, *A. appellat B. quòd sicut fuit in pace domini regis, etc., venit idem B. cum vi suâ contra pacem, etc., et duxit eum to such a place, etc., et in prisonâ ibi eum tenuit, etc., donec deliberatus fuit per ballivum domini regis; et quod hoc fecit nequiter, et in feloniam, offert, etc.* The defence was, *Et B. venit, et defendit vim, et injuriam, et pacem domini regis infractam, et captionem, et imprisonmentum, etc.* To this appeal might be taken the like exceptions as to the former. The appellee might justify taking him as his villein *nativus*, and might produce his relations to prove him such. The principal issue might be tried, as in the other appeals, *per corpus* or *per patriam*.

In an appeal, says Bracton, *de pace et plagis*, and in this *de pace et imprisonmento*, they might proceed civilly, notwithstanding the fact was criminal, and make the complaint as for an injury, without charging it *feloniously*; *quòd B. imprisonavit A. contra pacem domini regis*: and so, if in the county, *contra pacem vicecomitis*; if in an inferior court, *contra pacem* of the lord. If it was laid as an injury in this manner, it would not be followed with any corporal pain, but only a pecuniary fine, by way of damages; but when it was prosecuted as a felony, these offences, as well as the others, produced a judgment of life and limb.<sup>1</sup> It should seem, that an appeal, laid in this way, would become what we should now call an action of trespass.

Before we take leave of *imprisonment*, it may be proper to mention a more speedy redress, in cases of imprisonment, than an appeal. This might be resorted to, not only where a private person imprisoned or put restraint upon another, without any show of authority, but also where officers of justice, under color of process, caused persons to be put in confinement. It was from this latter case that the writ *de homine replegiando* took its name, and to this it was more peculiarly adapted; for, in the former instance, it was most probable a person would use that power, which the law allowed, of recovering his liberty by force, or whatever means fell in his way. The writ was directed to the sheriff, as follows: *Præcipimus tibi, quòd justè et sine dilatione replegiari facias A. quem B. cepit et captum detinet; nisi captus sit per speciale præceptum nos-*

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<sup>1</sup> Bract., 145 b.

*trum, vel capitalis justitiarii nostri, vel pro morte hominis, vel forestâ nostrâ, vel pro aliquo alio recto, quare secundum legem Angliæ non sit replegiandus, ne amplius, etc., pro defectu justitiæ, etc., teste, etc.*<sup>1</sup> A man, therefore, who was taken and detained unlawfully, was to be discharged upon pledges being given, as in the case of goods taken for a distress.

To these remedies by way of redress, or punishment when an injury had been done to a man's person, it may be added, that the law held out a protection, by way of security and prevention, to those who apprehended any danger of that sort. Thus, a man might pray the king's peace in court against any particular person; and if such person should, after that, do anything in breach of such peace, he incurred the penalty of the court's displeasure, and was accordingly *in misericordiâ*.<sup>2</sup>

There now remain only four more appeals to be explained; that *de pace et roberiâ*; that *de combustione domorum*; that *de raptu virginum*; and lastly, that *de furto*.

The appeal of robbery was in this way: *A. appellat B. quodd sicut fuit in pace domini regis, etc., venit idem B. cum vi suâ, et nequiter et in feloniâ, et contra pacem domini regis, et in roberiâ abstulit ei, etc.*, naming the thing taken, its quality, quantity, price, weight, number, color, and the like. Sometimes there was contained in this appeal a charge of wounding, mayhem, or imprisonment. The conclusion was, as in the other appeals, *et quodd hoc fecit nequiter et in feloniâ, etc.* Then begun the defence. *Et B. venit, et defendit pacem et feloniam, etc.* A person might have this appeal for the goods of another which were then in his keeping, but he was to state such circumstance specially: *Abstulit ei decem aureos, de denariis domini sui, quos habuit in custodia suâ, et unde ipse intravit in solutionem erga dominum suum, etc.* The punishment of robbery depended upon the nature of the crime; it was sometimes punished with loss of life, and sometimes with loss of limb.<sup>3</sup> The felonies of this time were punished variously, according to the circumstances of the case, by death or mutilation; and hence it was, that judgment of life and limb signified in after times the same as judgment of felony.

All burning of other persons' houses, if done *nequiter et in feloniâ*, as on account of any malice, or animosity, or

<sup>1</sup> Bract., 154.

<sup>2</sup> Ibid., 142 b.

<sup>3</sup> Ibid., 146 a, b.

for sake of plunder, was punished capitally. The appeal was in these words: *A. appellat B. quodd cum ipse esset in pace, etc., venit idem B. nequiter et in feloniam, etc., ubi ipse A. interfuit et vidit, et ignem apposuit domibus suis, et eas combussit, et de catallis, etc., in roberiam contra pacem, etc., asportavit, etc.*, to which the appellee made his defence, and the proceeding was the same as in other appeals.<sup>1</sup>

The appeal *de raptu virginum*, as it is called by Bracton, was not confined to those only who were literally such, but was a remedy in all cases where a woman had been *vi oppressa*. The punishment of this crime was *membrum pro membro*, according to Bracton; *corruptor puniatur in eo in quo deliquit; oculos igitur amittat, propter aspectum decoris, quo virginem concupivit; amittat et testiculos, qui calorem stupri induxerunt*. This was not always the punishment; but it was varied according to the character of the woman. It was sometimes greater, sometimes less; and depended on the woman being married, or a widow living in reputation, a nun, a matron, a lawful concubine, or one living in prostitution; for even these were under the protection of the king's peace. In former times, the corruptors of virgins used to be hanged; but the punishment was now reduced to the above pain, loss of limb, and other corporal punishments, and such offenders were never punished with death.<sup>2</sup>

An appeal of rape was to be commenced and conducted like others. The words of appeal were these: *A. fœmina B. appellat C. quodd sicut esset in, etc., venit idem C. cum vi sua, et nequiter et contra pacem domini regis concubuit cum ea, et abstulit ei pucillagium suum, et eam detinuit secum per tot noctes*, setting forth the circumstances of the fact; and concluding, *quodd hoc, etc., offert probare, etc.*, as in other cases. Then followed the defence: *Et C. venit, et defendit feloniam, et pacem, et raptum, etc.*<sup>3</sup> It was an exception to this, as to other appeals, that there was not sufficient suit made; with others arising from the circumstances peculiar to this crime. The party might deny that she *amisit pucillagium*; which would be tried by inspection of four *legales fœminæ*. He might say, that she had before been his mistress; that it was with her consent; and he might put himself on the country to try it. He might except that there was no mention in the appeal *de pucillagio*.

<sup>1</sup> Bract., 146 b.<sup>2</sup> Vide vol. i., 383.<sup>3</sup> Bract., 147 b.

As to the marriage of the parties after conviction, that was to be quite voluntary on the part of the woman, though it was a sort of necessity in the man, in order to save the pains of the law.<sup>1</sup> An appeal against those guilty of *force*, in this crime, might be thus: *Quodd tenuit eam, dum idem B. abstulit ei pucillagium suum, or fuit in consilio et auxilio.*<sup>2</sup>

There were only two cases where a woman could bring an appeal: one was this, *de raptu*; the other was, *de morte viri sui inter brachia sua interfecti*. In the latter case, the appeal was always to charge the offence in that special way: *occidit ipsum B. virum suum inter brachia sua, etc.*<sup>3</sup>

In all the foregoing appeals it has been supposed, that the appellee was either in custody, or at least was forthcoming at the trial. When it was not so, there issued a writ of attachment. This, in case of homicide, was, *Si te fecerit, etc., tunc attachiari facias B. per corpus suum*: if in any other of the before-mentioned crimes, it was only, *Si te, etc., pone pervadium et salvos plegios*. Any of the before-mentioned appeals might be removed from before the justices itinerant (to whom it was the course for the parties to have a day given by the county) into the court *coram nobis, vel justitiariis nostris apud Westmonasterium*; for which purpose, a writ of *venire facias appellum* would issue, containing in it likewise a *pone per vadium et salvos plegios* against the appellee. If he did not appear upon any of these attachments, another writ issued, *quodd facias interrogari de comitatu in comitatum*, till he was outlawed, at the king's suit.<sup>4</sup> The above process of attachment was likewise the course if the appeal had been begun in the first instance, as it might have been, *coram ipso rege, vel justitiariis suis de banco*. Did any contest arise about the agreement between the appeal made in the county and that in the superior court, there issued a *recordari facias* to the county, to enable the justices to compare them.<sup>5</sup>

Among other offences we must not omit *theft*, which, since the time of Glanville,<sup>6</sup> had become one of the pleas of the crown. There lay an appeal of this offence not only in the king's great court, but also in the county court, court baron, and others. As this seems to be in violation of the prohibition of *Magna Charta*, it must be

<sup>1</sup> Bract., 148.<sup>3</sup> Ibid. Vide vol. i., 461.<sup>5</sup> Ibid., 149 b.<sup>2</sup> Ibid., 148 b.<sup>4</sup> Bract., 149.<sup>6</sup> Vide vol. i., 462.

considered what sorts of theft were held to be out of the meaning of that act. Theft was either *manifest* or *not manifest*. The latter was, when a person was suspected of theft *per famam patriæ*, and where there were strong presumptions appearing against him; of this kind of theft, none could hold plea but only the king in his own courts. But of *manifest* theft, which was when the offender was taken with the thing upon him, and was called *hand-habende* and *bacherende*; of this several inferior courts might hold plea.<sup>1</sup>

The jurisdiction and judicature of these inferior courts was termed by some very barbarous names. Lords of franchises had cognizance of crimes under the titles of *Sok et Sak*, *Tol et Team*, *Infangethef et Utfangethef*. *Infangethef* was, when a thief was taken with the thing stolen upon him (*with the manour*, as it has since been termed) within the lord's land, being himself one of the lord's tenants. *Utfangethef* was, when a stranger was so taken. Thus, these authorities to judge of theft were entirely local, the lord having no power to pursue his own tenants out of his jurisdiction, but yet enjoying a right to question strangers, when they accidentally came within it, under particular circumstances of guilt. Where the thief was not taken *with the manour*, then it belonged only to the king's court to inquire thereof.<sup>2</sup>

Theft is defined by Bracton to be, *contrectatio rei alienæ fraudulenta, cum animo furandi, invito illo domino, cujus res illa fuerit*. The words of appeal were, *Quod in feloniâ, et furtivè, et in latrocinio, et contra pacem domini regis cepit rem illam, et furtivè abduxit eam; et quodd hoc fecit furtivè, et in feloniâ, offert, etc.* To this the appellee answered, and defended the felony and larceny, either *per corpus* or *per patriam*. If he chose the former, they proceeded as in other cases: if the latter, he might state many things in his defence.<sup>3</sup> He might say, the thing supposed to be stolen was his own, and show the reason thereof; as if it was a horse, he might say it was foaled by one of his mares, and that he bred it; and if this was testified by the country, he was set at liberty, unless the appellor could show by the country and the vicinage, and by some other certain proofs, that it was his foal, and he

<sup>1</sup> Bract., 150 b.

<sup>2</sup> Ibid., 154 b.

<sup>3</sup> Ibid., 150 b.

bred it up; and when a *secta* was thus produced on both sides, that was preferred which was the greater and more deserving of credit. But if both sides were upon an equality as to their *secta* and testimony, then other credible persons were to be called out of the neighborhood, who were not connected with either of the parties; and for whomsoever they agreed, he was adjudged to be in the right, and so the matter was decided. If the defendant said he bought it, or that it was given him, then he was to call the seller or giver to warrant it. They then proceeded as in cases of vouching to warranty in civil suits. The warrantor, if he appeared, either entered into the warranty, or denied his being bound to warrant; and in that case, the appellee was to prove it against him *per compus*, and so it was decided by duel. If the warrantor entered into the warranty, then the appeal went on between the appellor and him, and the appellee was discharged. The warrantor might vouch over, and so on. If the warrantor did not appear, there issued not a summons, but a *venire facias*.

If the thing stolen was bought, and the buyer had no warrantor to vouch, there was a distinction between buying privately and publicly in a fair or market, in the presence of the officers of the market, where a toll was paid; for, in such case, the appellee, upon restoring the thing without receiving back the price, would be discharged from the appeal.<sup>1</sup> It sometimes happened that sturdy fellows, who were best suited to this kind of decision, were hired to warrant; if this appeared to the justices, they might direct it to be inquired of *per patriam*, and such champion was to have his foot and fist cut off. The punishment of theft depended on the value of the thing taken. No Christian man, says Bracton, is to lose his life for a small theft. However, he does not specify the degree of value which made the distinction, as now, between grand and petty larceny; he only says that a thief convict was, according to the value of the thing, either to die, or to abjure the realm, or country, or county, city, borough, or vill; or he was to be *fustigatus*, and then discharged.

It was generally held that a wife should not be charged

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<sup>1</sup> Bract., 151.



*ex facto viri*, because, being supposed to be under his power and control, the law, in tenderness, would not make her answerable for a participation *primâ facie* in the fact with her husband. Yet if she evidently appeared to make herself an assistant in the felony, as if the thing was found in her own separate custody, she would be considered as a party to the theft. On the other hand, the circumstance of property found in possession of the wife, did not conclude the husband so as to make him a party. Indeed it seemed to depend upon nice circumstances, whether a wife committing felony together with her husband, should be considered as participating in the offence; and whatever privileges were allowed the wife, no concubine, nor any of the family, could claim them.<sup>1</sup> A woman convict, if pregnant, was not to be executed till she was delivered.<sup>2</sup>

Persons convicted of a felony could not bring an appeal against any one. The law pronounced of them *frangitur eorum baculus*, meaning that they were Of provors. disabled from deraigning the duel in proof of their charge. But it was not so of a *probator* or *provor*, as he was called; for he, though he confessed his crime, was not regularly convicted thereof; and the king would grant such a person his life, upon condition that he would contribute to free the country from felons, either *per corpus*, *per patriam*, or *per fugam*, by causing them to fly. A man who had thus confessed his crime, was to appeal others as accomplices therein. This sort of accusation was kept under some check; for if the person appealed by him was a liege man to some one, and in frankpledge, and had some lord who would vouch for him, and he himself was willing to put himself upon the country; if he was delivered and acquitted by that country, the provor was to be condemned as a liar and convict felon. But if the person appealed was in no decenna, nor had any lord to own him, and had refused to put himself upon the country, as he appeared on the same suspicious footing with the provor, they then were permitted to wage the duel. So again, if he had consented to put himself upon the country, and the country had declared him a suspicious person, then, likewise, the duel was to be resorted to.

If a felon confessed his offence before the sheriff and

<sup>1</sup> Bract., 151 b.

<sup>2</sup> Ibid.

coroners, and became a provor, and still continued, when before the justices, to accuse others, he was to bind himself to convict such a number as he named; and upon those terms his life was granted him. None could admit a man to become a provor but the king, as none but he alone could pardon the pain of death. The judge might do this, as the king's representative in judicature, either by his own authority, or under the direction of a special writ commanding him so to do;<sup>1</sup> in either case, there issued process of attachment against the parties appealed, and so on to outlawry, if necessary.

The words of appeal were: *A. de N. COGNOSCENS se esse latronem, appellat B. de societate, et latrocinio; quodd ipsi simul furati fuerunt, etc.*;<sup>2</sup> to which the appellee answered, *Et B. venit, et defendit societatem, et latrocinium, etc.* The duel was waged, and the oath taken in the same manner, *mutatis mutandis*, as in other cases. If the provor vanquished one, he was to go on with the others. Should the appellee be successful, he was not to be wholly discharged, but, on account of the suspicions arising from the charge, he was to be let out on pledges, unless the justices saw any particular reason for committing him to gaol, as if he was indicted by the knights, or other credible persons. In the former case, if he could not find pledges, he was to abjure the realm, or to remain in gaol forever;<sup>3</sup> as should the other appealed persons, if the provor died before the duel. The provor, if victorious, was to have his life according to the terms on which it was promised, but was to be sent out of the realm, even though he offered pledges to answer for him.<sup>4</sup> Thus stood the law concerning provors; an expedient in the prosecution of criminals, founded upon the loose state of the police, when malefactors were suffered to associate in great parties, and could not be easily discovered but by setting them one against the other (a).

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(a) These actions were described in the *Mirror* as "personal actions," not as we should now use the term—meaning actions relating to personality—but actions for injuries, corporeal or incorporeal, to the person: being thus distinguished, on the one hand, from real actions, and on the other, from what the *Mirror* calls mixed actions—that is, not real, nor relating to the person, but to personality—as actions of debt, contract, trespass to property, real or personal; detinue, and the like. The learned author, therefore, is in error in supposing that this class of actions embraced all actions of trespass;

<sup>1</sup> Bract., 152.

<sup>2</sup> Ibid., 152 b.

<sup>3</sup> Ibid., 153.

<sup>4</sup> Ibid., 153 b.

We have hitherto considered only the higher order of crimes, which were prosecuted criminally, and produced either capital punishment, loss of limb, or banishment, perpetual or temporary. It follows that some notice should be taken of the lesser order of crimes, which were prosecuted civilly. Actions founded upon injuries, as they are called by Bracton (by which are meant actions of trespass), belonged, as well as the former, *ad coronam regis*, inasmuch as they were<sup>1</sup> *contra pacem domini regis*. *Injuria* is defined by Bracton to signify anything *quod non jure fit*. Those injuries of which we are now going to speak, were followed by a pecuniary penalty, to which, according to the nature of the case, was sometimes added imprisonment. An injury was not only when a person was wounded, beat, or struck, but also when any slander was spoken of him, or a *famosum carmen* was made on him. Again, a man might sustain an injury not only in his own person, but in the persons of others who were under his authority, as in those of a wife or children. But though a man might have an action for an injury to his wife, she could not have one for an injury done to him; for though the wife was to be defended by the husband, he was not to be protected by her. A man also might suffer an injury when any was done to his servant, or villein, as if they were in any way beaten,<sup>2</sup> and his honor was thereby hurt, or any interruption occasioned to his affairs; for otherwise an action for beating belonged to the servant, and not to the master. An action for injury, or, as it may be more properly called, an action of trespass, lay not only against the person actually striking, but against all procurers and contrivers thereof. This action should be brought immediately, for if the injury was dissembled for any time, such delay would bar the party of his action.<sup>3</sup>

*Vetitum namium*, or the detention of a *namium* (now called a distress), was a subject belonging to the jurisdiction of the king's crown; and cognizance thereof was rarely allowed to any except the king

*Of vetitum  
namium.*

but only trespasses to the person. These actions are also called in the *Mirror* personal actions venial, because supposed to be against the peace, and to partake of the nature of offences, and yet not criminal.

<sup>1</sup> *Aliquando*, says Bracton; they sometimes did, and sometimes did not, belong *ad coronam regis*.

<sup>2</sup> Bract., 155.

<sup>3</sup> *Ibid.*, 155 b.

or his justices. But because questions of distress required despatch, on account of the nature of the subject taken, which was sometimes living animals, a special jurisdiction used to be given to the sheriff, who, in this instance, did not act in his office as sheriff, but as *justitiarius regis*. If any one claimed a franchise to hold plea *de vetito namio*, it was *ut justitiarius regis*, by special grant.<sup>1</sup> The title of distress is passed over by Glanville, with a bare mention of the writs directed to the sheriff commanding him to make deliverance.<sup>2</sup> The learning upon this subject had, since his time, been wrought up into some size and system; a sketch of which, as it now stood, it may be very proper to give.

The questions arising in this plea related either to the *caption* or *detention against gage and pledge*. The caption might be just or unjust. It was just when taken for a service detained by a person who acknowledged it to be due; and in that case the taker might avow the taking; but if the things justly so taken, were detained against gage and pledge, after security was offered for payment of the service, and all arrears (or whatever the cause might be, as damage done, some trespass, debt, or the like), then, though the caption might be just, the detention was unjust. If the lord defended the unjust detention, and the plaintiff had at hand his *secta* (a), who all agreed in testi-

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(a) "Secta" were suitors of the court prepared to testify for the party. It is said in Fleta, that the rule which required the party to produce his "secta," i. e., his suit or following of witnesses, was derived from the clause in Magna Charta: "Nullus liber homo ponitur ad legem nec ad juramentum, per simplicem loquelam, sine testibus fidelibus ad hoc ductis" (Fleta, 137). Whether this meant witnesses who were to be sworn to declare the truth, or were to be examined as witnesses before the jury, is not quite clear; in either case there is a difficulty. In the one case, the parties would appear to choose the jurors; in the other view, jurors upon evidence must have already arisen: though, indeed, both systems could be united; and some of the jurors testify to their fellow jurors: and this seems indeed to have been the system. As to compurgators, they clearly were produced by the party who was to wage his law. That was the origin of wager of law, as it was called—twelve men being required, as Lord Coke explained, including the defendant, because every trial by compurgation was to supersede a jury (2 Inst.), and so compurgators were equal to a jury, including the defendant, who was one of them. Thus the defendant himself might be one of the compurgators, and thus put in place of a juror; and there does not seem any difficulty in supposing that his "suit" were examined, as witnesses and jurors before the other jurors, and that these gave their verdict on the testimony of the others.—(Vide first part.) This seems the real origin of trial by jury.

<sup>1</sup> Bract., 155 b.

<sup>2</sup> Vide ante, vol. i.

fyng in support of the fact, then was the defendant to wage his law *duodecimâ manu*; and if he failed in so doing, he was *in misericordiâ* to the sheriff (for we are now speaking of this proceeding when in the county), and was to restore to the plaintiff the damage he sustained by the detention. Had he succeeded in making his law, he would have gone quit; the cattle would be returned to the lord; the plaintiff would be *in misericordiâ* (but without paying damages); and must satisfy the lord for the service due.

Had the question been upon the unjust caption; as for a service which the plaintiff disclaimed, and did not acknowledge to be due, and of which therefore no plea could be held without the king's writ; if the plaintiff showed by a sufficient *secta*, that the taking was for a service which he disclaimed; then, as this was a point upon *the right* which in a proper proceeding by the king's writ might come to be decided by the duel, or the great assize, there was an end of the suit in the inferior court, and resort must have been made to the writ of right,<sup>1</sup> which was the writ that was afterwards called a writ of right *sur disclaimer*.<sup>2</sup> If the lord had seisin *per manum tenentis* of the service for which the distress was taken, and upon the plaintiff's denying it, this was certified *per patriam*; the plaintiff was *in misericordiâ*, and he was to return the cattle to the lord; for in this case, as there was a recent seisin, they could not possibly come to the duel, or the great assize. But should the inquest find that the lord had not seisin *per manum tenentis*, then he was to be *in misericordiâ*; the plaintiff was to recover his damages; the cattle delivered were to remain in his hands; and the lord had no redress but some writ in which he might try the right by the duel, or the great assize. In like manner, should the tenant die, and the heir deny the service, the lord might allege against him a recent seisin thereof *quasi per manum tenentis*, if he had seisin thereof a year and day before the tenant's death.

Complaint might be made both of the unjust caption and detention; and when the complaint was of this sort, and the defendant denied both, if one was found for the plaintiff and one for the defendant, one party was to be *in misericordiâ* as to one, and the other *in misericordiâ pro falso*

<sup>1</sup> Bract., 156.

<sup>2</sup> O. N. B., 167.

*clamore*, as to the other. If the lord made default after he had waged his law, or had failed in his endeavor to make it, the cattle were to be delivered to the plaintiff, whatever might be the event of the suit.

The subject of replevin and distress will be understood better if we trace it from its commencement through all its stages. When any one had a complaint that his cattle were taken, or detained against gage and pledge, he either applied for a writ commanding the sheriff *quodd replegiari facias*, as we saw in Glanville's time;<sup>1</sup> or made a verbal complaint to the sheriff, who, upon having security *de proseguendo* properly given, would, without a writ, proceed to make replevin. The manner of replevying was this: The sheriff went in person, or sent one of his officers, to the place where the cattle were detained, and demanded a sight of them. If this was denied him, or any violence was done to prevent it, he might immediately raise a hue and cry, and apprehend the offenders, as persons who acted in manifest violation of the king's peace, and put them in prison. If he could not find the cattle to make deliverance of them, and it appeared that they were driven away; then, if the taker had any land and chattels in the county, the sheriff's officer was to take some of his cattle to double the value, and detain them till the distress was brought back, which, in after times, was termed *a taking in withernam*. If the taker had no land or chattels within the county, as the sheriff's power could reach no further, recourse must be had to a writ of attachment as follows: *Si A. fecerit, etc., pone per vadium et salvos plegios B. quodd sit eorum justitiariis nostris apud Westmonasterium, etc., ostensurus quare cepit averia ipsius in comitatu, etc., ubi idem B. non habet terras nec tenementa, et ipsa fugavit à prædicto comitatu, etc., usque ad comitatum tuum in fraudem, extra potestatem vicecomitis, etc., et ibidem ea detinet, contra pacem nostram, ut dicit, etc.*<sup>2</sup>

If no opposition was made to the sheriff or his officer, but he was suffered to have a sight of the cattle, he was immediately to cause them to be delivered to the complainant; and then he gave a day to both parties, to appear at the next county, that the taker (who could not deny the taking against the sheriff's testimony, he, in this case, having the authority of a record) might show his taking to

<sup>1</sup> *Vide* vol. i., 440.

<sup>2</sup> *Bract.*, 157.

be just; and the complainant, that it was unjust. At the day appointed in the county, the taker could have no es-  
soin, as an unjust taking and detention against gage and  
pledge was considered in the unfavorable light of a rob-  
bery, and was held to be against the peace even more than  
a disseisin was. At the day, the taker was to state his  
reasons for the caption.

The grounds upon which a justification for taking cattle  
might be rested were many. It was very common in these  
times, to justify under the judgment of the lord's court,  
where it often happened there had been some compulsory  
proceeding to recover the duty in question. Thus the  
taker might say, that *justè cepit*, and *per considerationem curiæ  
sue, pro servitio quod idem quærens, et tenens suus ei debuit, et  
ei injustè detinuit*; for which he might vouch his court  
to warranty, if he pleased, and deny that he detained  
it against gage and pledge. To this the plaintiff might  
reply, *quodd ille unjustè cepit, et detinuit*; "because, being  
summoned to appear in the defendant's court to answer for  
certain services and customs demanded of him, he there  
said he owed him no services, and demanded judgment, if  
he was to be put to answer without the king's writ, in a mat-  
ter that touched his freehold; and yet, nevertheless, the  
defendant took his cattle, and distrained them for a ser-  
vice which he did not admit to be due, and when he de-  
manded his cattle, he refused to deliver them;" *et de hoc  
praducit sectam*, which was to consist of credible persons,  
who were present in court.<sup>1</sup> If they agreed in maintaining  
what he had said, then the court was summoned; and if  
that agreed with the *secta*, then there remained nothing but  
to inquire whether the distress was made by judgment of  
the court, or by the lord's own voluntary act. If the for-  
mer, then the court was *in misericordiâ*, for its false judg-  
ment; if the latter, then the lord was *in misericordiâ*; and  
in both cases the cattle remained with the person to whom  
they had been delivered. If there had been no proceeding  
in the lord's court, and he justified for service due, then  
they proceeded as before mentioned, observing the above  
distinction, where the service demanded was a question of  
*right*, and where of *recent seisin*.<sup>2</sup>

The defendant might avow the taking to be just, because

<sup>1</sup> *Vide ante.*

<sup>2</sup> Bract, 157 b.

he had a freehold in which neither the plaintiff nor any one else had a right of common, or other easement, and yet the plaintiff had put his cattle there without any right, and therefore he took them; though he was ready to restore them, if the plaintiff would abstain from the like trespasses, which he refused to do. To this the plaintiff might reply, that the taking was unjust, because he had a right to common there, which he was ready to show as the court should direct; and therefore it was, that he would not find pledges to obtain a release of his cattle. When the suit was brought to this issue, the county court could proceed no further in it, and the cattle were to remain with the person to whom they had been delivered. If the plaintiff still persisted in exercising the right, the defendant, could he not otherwise defend himself, might have an assize of freehold, or the plaintiff an assize of common.

The defendant might say, that the taking was just, because he found them *damage feasant*, or doing damage in his land, and therefore he impounded them, as by the law and custom of the realm he might do, till satisfaction was made him; that the plaintiff would not make satisfaction, nor give security for it; nor did he demand them upon gage and pledge; or, if he did, they were tendered to him: and of all this the defendant was to produce his *secta*. If the plaintiff meant to deny the whole, he was to *defend* it (for so Bracton expresses himself, as if he considered the plaintiff, in this situation, in the light of a defendant) *per legem*. If he meant to reply to any particular parts of the defendant's answer; as, that though they were taken lawfully by the defendant, yet they were detained unjustly against gage and pledge, for he came with other credible persons to the defendant, and offered to make amends, which he refused, and still detained the cattle; then, in either of these cases, he was to produce a sufficient *secta*: and if the defendant meant to deny the whole of the reply, he was to wage his law; so that then law would be waged on both sides. If the plaintiff denied that any damage was done, or that any was shown to him when he tendered amends, then the defendant was to produce a *secta*, to prove that he took them *damage feasant*.<sup>1</sup> Where a defendant justified for

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<sup>1</sup> Bract., 158.



service due, if the plaintiff said there was nothing in arrear, and produced a sufficient *secta* to prove it, the taking being thus proved unjust, the defendant could not defend himself *per legem*.<sup>1</sup>

If a servant had taken cattle in the absence of his lord, and, when they were afterwards demanded of the lord, he refused to deliver them upon gage and pledge, then they were both liable, the one for the caption, the other for the detention; and if he avowed the caption, this did not free the servant, but both of them became answerable for the servant's act.<sup>2</sup> When the cattle had been once delivered by the judgment of the county court, they were not to be taken for the same cause, till the suit was determined; and if any should presume to take them again, it was considered as a breach of the peace, and there issued a writ, stating specially what had been done therein, and commanding the sheriff, *quòd habeas eorum justitiariis ad primam assisam, etc., corpus ipsius B. ad respond de secundâ captionem, etc.*, or the party might be heavily amerced in the sheriff's court, *coram te, et coram custodibus placitorum coronæ nostræ, et castigatio illa in casu consimili aliis timorem tribuat delinquendi*, as one of the forms of this writ expresses it. This second caption, or, as it was afterwards called, *recaption*,<sup>3</sup> as well as the first, was to be proved by examining the *secta* produced on both sides.<sup>4</sup>

Sometimes chattels were demanded under the name of *averia*; as where any one had begun to hedge, or raise a fence upon another's soil, and had brought a cart, horses, and tools there; if these were detained against gage and pledge, the question might be brought into the county court, in the above way. But here, if the plaintiff said the *locus* was his freehold, the jurisdiction of the county failed, and recourse must be had to an assize of novel disseisin; and in the meantime the things were to be returned.<sup>5</sup>

Thus have we travelled through the learning and practice of the reign of Henry III. It is with regret that we must here take leave of an author who has been our constant and faithful guide through the intricate paths of this long pursuit. From the time we are deserted by

<sup>1</sup> Bract., 158 b.

<sup>2</sup> Ibid.

<sup>3</sup> This writ of Recaption is said by the O. N. B. to be by the Stat. Marl., c. iii., but we see it was at the common law.

<sup>4</sup> Bract., 159.

<sup>5</sup> Ibid.

Bracton, we are left to make the remainder of our inquiry with such information as can be collected from many different sources. Instead of having the whole of the law of any particular period laid open to our view in a systematical manner, we must be content, except in a very few instances, to pick out the following part of our narrative from statutes and records, year-books, and other compilations.

It appears from the investigation which we have just been making, that, notwithstanding the civil commotions of this reign might perhaps, in some particular cases, interrupt or suspend the full execution of the law, the learning of it was advanced to a very high degree. The great pains bestowed by Henry II. (a) in establishing our law,

(a) There is no evidence that he or any other of the Norman kings took any interest at all in the law or in the administration of justice, otherwise than as a source of revenue or a means of oppression; and it has been shown elsewhere, and is indeed suggested by the author himself elsewhere as to John, that the only interest they took in the subject is to be ascribed to those motives. All the improvements in the law and the administration of justice in these times will be found to have emanated from the able men who were appointed to the office of chancellor or justiciary, especially the celebrated Glanville. The justices itinerant were sent not only to hear pleas of the crown and common pleas, but to assess "talliares" upon the tenants of the king's desmesnes, and collect fines and amercements and other sources of revenue, and their executions and oppressions were often so infamous and intolerable, that their approach was dreaded; and in the year 1261 (45 Hen. III.), we find from a contemporary chronicler that a county remonstrated against their coming, because seven years had not elapsed since their last visit (*Ang.-Sax. Laws*, i. 495). As regards the administration of justice in general, in this age, it certainly had attained a certain degree of settlement and regularity. Thus, for instance, that separation of the law from the fact, and that distinction of the functions of the jury and of the judges, which form the foundation (as Sir J. Mackintosh observes) of our system, had become well understood. In the *Placitorum Abbreviatio* there is an entry in the 6 Richard I., that "subjudicibus licet contentio fuit, citrum carta prædicta debet tenere versus puerum que infra ætatem" (*Plac. Abr.*, 5 *War. temp. Richard I.*). And again, in the fourth year of King John, the jury, upon an inquisition, declare, "non pertinet ad eos de jure discernere" (*Plac. Abr.*, 40; *Linc. Temp.*, 4 *Johan.*). "Veritas habenda est in juratore justicia et judicium in iudice. Videtur tamen quod aliquando pertinet judicium ad juratores, cum dicere debent si talis disseisiverit talem vel non disseisiverit; et secundum hoc videtur judicium. Sed cum ad judicium pertineat justum proferre judicium et reddere, oportebit eum diligenter deliberare et examinare, si dicta juratorum in se veritatem contineant, et si eorum justum sit judicium vel fatuum" (*Bracton de Legibus*, lib. iv., p. 187). "Item sic ad justiciarum pertinet delegentissima examinatio, ita pertinet ad eum justa sententiæ prolatae sed ante judicium examinare debet factum, et dicta juratorum, ut securè possit procedere ad judicium" (*Ibid.*). So the administration of justice had become so far regular that an order of advocates was already established. Bracton makes express mention of counsels, pleaders, and advocates in the reign of Henry

and improving the administration of justice, enabled it to take deep root, and support itself through the reigns of Richard and John, though not assisted by any particular regard from those monarchs. In this reign it had acquired a stability, which withstood every discouragement and check from the turbulence of the times.

The study of the civil and canon law had contributed to further this improvement, and to furnish considerable accessions both of strength and ornament. Those two laws, besides exciting an emulation in the professors of the common law to cultivate their own municipal customs, afforded from their treasures ample means of doing it. Much was borrowed from thence, and ingrafted on the original stock of the common law. But the manner in which this was done is very remarkable. Though our writs and records are in the language in which the Roman and pontifical jurisprudence were written and taught, there is not in either the least mark of imitation; the style of them is peculiarly their own (*a*). The use made of the civil and

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III. (*De Legibus*, lib. v., fol. 112 a, 372 b). And none *but* advocates were allowed to appear, as is proved by an entry in that reign upon the rolls: "Abell. de Sancto Martino venit et narravit pro Episcopo: et non fuit advocatus: Ideo et in misericordia custodiatur" (*Plac. Abr.*, 137; *Kanc. rot.* 22, temp. 32 *Hen. III.*). But, for all this, the administration of justice was far from being as yet firmly established in point of purity or impartiality, and it was still open to the grossest perversion and corruption, arising from the influence either of the sovereign or powerful persons, insomuch that we find repeatedly in this reign the barons deemed it necessary to appoint knights to go round with the itinerant justices to observe and report how they administered the law. An admirable illustration of the state of the administration of justice in that age is afforded by the following passage from one of the chronicles. The chronicler states certain injuries which the abbey of St. Albans had sustained from some person under the protection of one Mansel, and he then goes on thus: "Nec quicquam juris vel ultionis assistente memorato Johanne Regis lateribus et conciliis, potuimus obtinere. Quinimo metus et persua sio ipsius Johannis omnium Justiciariorum et placitantium advocatorum (quos Banci narratores vulgariter appellamus) ora penitus obturavit, ita, ut multo totiens oportuit Dom. Willielmum tunc cellarium (visum scilicet circumspectum et faciendum) suum sermonem et querelam in persona propria coram Justiciariis imo etiam coram Rege proponere. Et protestati sunt Justiciarii, secretarii in aure dicti, Dom. Willielmo instillantes, quod duo tunc temporis in regno dominabantur, scilicet comes Ricardus et Johannes Mansel, contra quos, non audebant sententione" (*Matt. Par. Hist.*, p. 1077). That is to say, that they *durst* not do justice against them.

(*a*) It is conceived that this is an error. The very idea of such fixed, formal requisites of actions is evidently borrowed from the *formulae* of the Roman law. Their whole style, in their severe, compressed brevity, is evidently framed upon those models, and in many instances there is an exact conformity even in expression. Take, for instance, those well-known and essential

canon law was much nobler than that of borrowing their language. To enlarge the plan and scope of our municipal customs; to settle them upon principle; to improve the course of our proceeding; to give consistency, uniformity, and elegance to the whole; these were the objects the lawyers of those days had in view: and to further them, they scrupled not to make a free use of those more refined systems. Many of the maxims of the civil law were trans-

words of the writ of trespass: "*vi et armis*;" they are evidently borrowed from the *formula* founded upon the *Lex Julia* as to *vi*. A learned author, in an interesting note on the subject, cites from a French writer some instances of writs used in French courts in order to show a French origin for the system. The writs cited, however diffuse and narrative in their style, are as unlike ours as possible, and, moreover, were evidently only French adaptations of the Roman usages. Ours adhered far more closely to the Roman originals, and the learned writer alluded to evidently thought that our writs were of Roman origin, for he thus concludes his elaborate note on the subject: "One of the earliest refinements in forensic science was that of classifying the various subjects of litigation, and allotting to each class an appropriate *formula* of complaint, or claim—a method devised with a view, probably, to the more certain definition of the nature of those injuries for which the law afforded redress, and perhaps also to save the trouble of inventing new modes of expression for each particular case of wrong as it arose. Whatever the object, it is certain that such was the practice of ancient Rome, and that from a period almost as early as the formation of the laws of the Twelve Tables (*Dig.*, lib. i., tit. 2, *Cic. pro Rosc. Com.*, c. viii.); and so severely were these formulæ observed, that any deviation from them was fatal to the cause. This strictness evidently tended to injustice, and we accordingly find that it was banished from the Roman law by Constantine, who abolished the judicial formulæ (*Quint.*, lib. vii., c. iii.). Yet form was not altogether extirpated. Certain general distributions of the subjects of litigation were recognized under the title of *actions*, and considerable attention continued to be paid to the frame and wording of the complaint (*Just.*, lib. iv., tit. 6). When, therefore, we find the rude judicature of the nations who were in possession of Europe at the fall of the Roman Empire exhibiting, at a very remote period, the same contrivance of fixed judicial formulæ, we are naturally led to refer it to an imitation either of the ancient or more modern system of their predecessors" (*Stephens on Pleading*, note 2). It is impossible not to perceive that the learned writer was of opinion that our writs were derived from the Roman law, and that his opinion was correct. They were, it may be added, issued under the Romans by the prætor, and ours were issued by the chancellor. So the whole system of pleading was derived from the Roman law. Bracton has a chapter devoted to it, headed, "*De Exceptionibus*," a phrase borrowed from the Pandects; and he uses the phrase "*litis contestatio*," which is taken from the civil law, and means, in substance, an issue. The terms used in pleading—"narratio," or "intentio," "exceptio," "replicatio"—were used by the civilians and canonists (*Dig.*, lib. xlv., tit. 1, s. 2; *Corv. Jus. Canon.*, lib. iii., tit. 32). Thus Bracton says: "*Usque ad litem contestationem, scilicet quousque fuerit præcise responsum intentioni petentes, et ita quod tenens se posuerit in assisum*," etc. (172, a). It is obvious that Bracton had the right idea of the real practical object of pleading, viz., to eliminate and define the real point in dispute.

planted into ours; its rules were referred to as parts of our own customs; and arguments grounded upon the principles of that jurisprudence were attended to as a sort of authority. This was more particularly so in what related to personal property; while the law of descent, the inquiry *per famam*, purgation, wager of law, and other parts of our judicial proceedings, seem borrowed from the canonical jurisprudence.

A considerable accession had been made to the original canon law contained in the *Decretum of Gratian* by the publication of the *decretals* of Gregory the Ninth, which happened during this reign. This must have given new vogue and reputation to canonical studies; and, no doubt, encouraged the commentators of this age to pursue their inquiries, in that way, with more freedom. The application they made, whether of the canon or civil law, in treating subjects of discussion in the law of England, is visible from the account just given from Bracton. To consider particularly, how much of the latter is indebted to those two systems, either for its origin or improvement, would lead us into a larger field than our present design could allow. It seems to be an object of a separate consideration; and might, perhaps, make a proper appendage to a History of the English Law.

The Book of Feuds was published during this king's reign, about the year 1152; and the particular customs of Lombardy as to feuds began to be the standard and authority to other nations, on account of the greater refinement with which that kind of learning had been there cultivated. It is probable that compilation was known here, but it does not appear that it had any other effect than influencing our lawyers to study their own tenures with more diligence, and work up the learning of real property with much curious matter of a similar kind. Thus, tenures in England continued a peculiar species of feuds, partaking of certain original qualities in common with others, but, when once established here, growing up with a strength and figure entirely their own. While most of the nations in Europe referred to the Book of Feuds as the grand code of law by which to correct and amend the imperfections in their own tenures, there is not in our law-books any allusion that intimates the existence of such a body of constitutions. To trace out

the affinity between the Law of Feuds which prevailed with us, and that which governed in Lombardy and other parts of the continent inhabited and settled by the German invaders, would be a subject of very curious inquiry; but this likewise, for the reasons before given, must be passed over in silence.

As study was encouraged, and the learning of the law advanced, a curious anxiety to improve imperceptibly led to refinement. The scholastic logic of the times was affected by all persons who wished to have the appearance of learning. The law, a disputatious science, naturally adopted the prevailing fashion, and our courts, like our universities, were filled with subtlety of argument and captiousness of exception. In the reign of Henry III. this rage of minute refinement had infected all branches of the law, and made almost every part of our jurisprudence in the highest degree artificial and complex.

Having taken a view of the law as it stood in the fiftieth year of this reign, it follows now that we should mention the statutes made subsequent to that period. The first of these is the *assisa panis et cervisiæ*, made in 51 Hen. III., stat. 1, containing many provisions on the subject from which it is entitled. To this statute another of the same year, entitled *judicium pillorie*, may be considered as supplemental. In the same year follow two statutes relating to the days of appearance at court, which deserve more particular notice. The first is entitled, *Dies communes in*  
*Dies communes*  
*in banco.* *banco*, generally in all real actions; the other is entitled, *Dies communes in banco in placito dotis*. These two acts afford us the first opportunity of speaking particularly concerning the days for return of writs, and continuance of proceedings, in term.

We have already seen that writs were returnable at certain stated days in different seasons of the year.<sup>1</sup> These returns, or *termini ad quos*, when they fell very near together, collectively constituted a period of legal business, which was called generally *terminus*, or *term*, during which the returns were seldom more than seven or eight days distant from each other. It has not yet appeared that any precise rule was settled, by which a writ was required to be returnable at any one of these stated days in preference

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<sup>1</sup> Vide vol. i., 454.

to another. Indeed, in the early times of our law, there does seem to have been some difference between the length of time allowed to persons summoned. In a law of one of our Saxon kings, it is directed, that if the party dwelt one county off, he should have one week; if two counties, two weeks; and so, for every county a week.<sup>1</sup> The same is laid down by a law of Henry I., with a restriction not to go beyond the fourth week, *ubicunque fuerit in Angliâ*; but if the party was beyond sea, he might have six weeks.<sup>2</sup>

There is no intimation, either in Glanville or Bracton, of any such rule prevailing in their times. It is not, however, unlikely that the returns, in the time of the latter, might nearly correspond with the scheme laid down by the statute of *dies communes in banco*. But this act does not give us entire satisfaction on that head; for, being only a direction to the justices *in banco* how to fix the returns of process which they issued in consequence of the return of some other writ, we are still uninformed as to the rule that governed in the return that was to be affixed to original writs. These, we know, might be obtained in the office of the chancery any day in the year. Whether they were made returnable at the pleasure of the clerks who penned them, or at the option of the purchaser, as is more probable, or whether a certain rule subsisted in the chancery office on this head, we are not able to collect (a).

(a) It appears that there had been a fixed period of fifteen days substituted for the variable period formerly allowed for appearance, in order that the defendant might know when he was bound to appear, and that the plaintiff might know when there was a default; and, further (as appearance in that age was personal), that certain days were appointed for returns and appearances, for the convenience of the court and the suitors. In the *Mirror of Justice* it is said to be an abuse to summon men without giving them reasonable warning upon which to answer (c. v., s. 6), and in the chapter describing writs, it is observable that no return day is mentioned. In another article it is said that after fifteen days no default should be allowable (c. v., s. 10, art. cviii.), and that in Alfred's time the process was "hasted" from day to day, that is, that it ran on, *de die in diem*, without any arbitrary return-days. The original practice, no doubt, was to allow a reasonable time for appearance, and reckon default, if there was no essoin or excuse, upon non-appearance, on the lapse of that time. But in course of time, appearance being personal, it became convenient to fix specific days for appearances and returns to writs, as otherwise the business of the court would be daily disturbed by appearances, etc. Thus it should seem that fixed return-days were an incident of personal appearance, and, when appearance ceased to be personal, were only an inconvenience, and probably would have disappeared,

<sup>1</sup> *Leges Ethel.*, c. 93.

<sup>2</sup> *Leg. Hen. Prim.*, c. 141. *Vide* Spelm. on Terms, s. 5, ch. 6.

When the original was once returned *in banco*, the rule for making the return of process upon it, and process upon that process, was as follows.

The statute of *communes dies in banco* directs, that if a writ came (according to the language of those times, or, as we should say now, was returned) *in octabis* of St. Michael, a day should be given (that is, the writ which issued upon it should be returnable, and there should be a *dies datus partibus*) *in octabis* of St. Hilary; if *in quindenâ* of St. Michael, day should be given *in quindenâ* of St. Hilary. If a writ came in three weeks of St. Michael, day was to be given *in crastino Purificationis*; if in a month of St. Michael, *in octabis Purificationis*; if on the morrow of All Souls, *in quindenâ* of Easter; if on the morrow of St. Martin, in three weeks of Easter; if *in octabis* of St. Martin, in a month of Easter; if *in quindenâ* of St. Martin, in five weeks of Easter. There was a special day given *in crastino Ascensionis*, which countervails (says the act) the same as in five weeks of Easter. If a writ came *in octabis* of St. Hilary, day was to be given *in octabis* of the Holy Trinity; if *in quindenâ* of St. Hilary, *in quindenâ* of the Holy Trinity, and sometimes *in crastino* of St. John the Baptist; if on the morrow of the Purification, *in crastino*, or *in octabis* of St. John the Baptist; if *in octabis* of the Purification, *in quindenâ* of St. John the Baptist; if *in quindenâ* of Easter, *in octabis* of St. Michael; if in three weeks of Easter, *in quindenâ* of St. Michael; if in a month of Easter, in three weeks of St. Michael; if in five weeks of Easter, or on the morrow of the Ascension, in a month of St. Michael; if *in octabis* of the Holy Trinity, on the morrow of All Souls; if *in quindenâ* of the Holy Trinity, or on the morrow of St. John the Baptist, on the morrow of St. Martin; if *in octabis* of St. John the Baptist, *in octabis* of St. Martin; if *in quindenâ* of St. John the Baptist, *in quindenâ* of St. Martin. Such is the manner in which these continuances connected one term with another. The returns that intervened between the issue and return of a

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but for the tenacity of any usage once established, and especially sanctioned by statute. And the ordinance under consideration, though one of those which Hale enumerates as not a statute of record, and possibly not acts of parliament at all, yet obtained in use as such (*Hist. Com. Law*, c. vii.). These return-days were modified by 1 W. 4, c. lxx., and abolished by the Uniformity of Process Act, 2 & 3 W. 4, c. xxxix.



writ were generally eight or nine, and the space of time about five or six months.<sup>1</sup>

If the process in any of the many actions which we have considered in the course of this reign was compared with this scheme of continuances, we should then see what a length of time must often be consumed before a party could be brought into court (*a*). We shall content ourselves with one example, namely, the process in a personal action, as given by Bracton.<sup>2</sup> Suppose a summons in a personal action was returnable *in octabis Michaelis*, the 6th of October, the process of attachment issued upon that would be returnable *in octabis Hilarii*, the 20th of January. If the party did not appear, there issued a second attachment *per meliores plegios* returnable *in octabis Trinitatis*, the 19th of June. If he did not then appear, there issued a writ of *habeas corpus* to take the body, returnable *in crastino Animarum*, the 3d of November. Thus ended the *solennitas attachiamentorum*, and so passed away a full year and almost one month.

If the sheriff returned upon this last writ, as it was probable he would, *non est inventus*, they then resorted to the process of distress, and a *distringas per terras et catalla* would issue, returnable *in tres septimanas Paschæ*, the 8th of May. If he did not appear to this, there issued another *distringas* returnable *in quindenâ Michaelis*, the 13th of October. If he did not appear, another *distringas* issued, *ne quis manum apponat*, returnable *in quindenâ Hilarii*, the

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(a) And there can be no doubt that all this elaborate system of process had been devised by astute and servile lawyers for the mere purpose of creating occasion for further fees at each successive stage of the process. For, be it observed, that *every writ meant a fee*, and therefore the more writs there were, the better for the king's revenue, which, as already observed, and as suggested by Lord Hale, and hinted by the author, was the great object of the interest shown by the Norman sovereigns in the administration of justice. It was, as Lord Hale observes, the rapacious and unscrupulous John who showed most attention to the subject, and there can be little doubt that this lengthening and elaborating of the process had its origin in motives of that kind, and that this system it was which was alluded to in *Magna Charta*, and is repeatedly complained of in the *Mirror*, as tending to *delay justice*—the delay, in fact, often amounting really to *denial*.

<sup>1</sup>How these differ from the terms in former times, *vide* vol. i., 454. It appears, that in the time of Glanville there were the three following returns in Easter term, viz., *In crastino post octabis clausi Paschæ*—a *crastino octabis clausi Paschæ in quindecim dies*—a *clauso Paschæ in quindecim dies*. Glanv., lib. i., c. 6, 13, 15. *Vide* also Spelm. on Terms.

<sup>2</sup>*Vide ante*, 257, etc.

27th of January. If he still did not appear, another writ issued for a caption into the king's hands, returnable *in quindenâ Trinitatis*, the 26th of June, or *in crastino St. Johannis Baptistæ*, which happens sometimes on the same day. And here ended the distress *per terras et catalla*, and the space of one year and more than seven months; so that the whole of this process, from the return of the summons to the return of the last *distringas*, would continue two years and more than eight months.

This is the utmost length to which the above process might be extended if no essoin was cast; but if any essoins intervened, and they were managed with dexterity, particularly if the parties could essoin *simul et vicissim*, the appearance in court might be still further protracted. Delays were not at an end, even after appearance. In real actions, we have seen how frequent occasion there was for summons and resummons, upon all which essoins might be cast. In all actions, whether real or personal, there were writs of *venire*, and other judicial process, together with *dies dati partibus*. The delay that might be procured by all these must have placed the issue, judgment, and execution at a great, uncertain, and almost unlimited distance.

Judicial process, like a *venire*, which issued merely out of the record, might not perhaps be considered as strictly within the statute, which, in the terms of it, is literally confined to the issue of a writ upon the return of a former. It is, therefore, not improbable that, in such cases, the justices exercised a discretion to shorten the intervals of the continuances, in the same manner as we know they had, very freely, in lessening the number of them.<sup>1</sup> At any rate, the return of a *venire facias* for summoning jurors must have been accommodated to the seasons within which such trials could be had. The *dies datus*, we know, was left not only to the discretion of the court, but to the election of the parties; hence *dies amoris*, and *dies datus consensu partium*.

In general, however, the justices were tied up to the times prescribed by the statute. This produced great inconvenience, to remove which the legislature interposed both in this and the following reign.

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<sup>1</sup> *Vide ante.*

In the very same year an act was passed, by which the writ of dower was made an exception to the above scheme of continuances; for, in that, days were to be given at much shorter intervals, in order that widows might not be delayed in recovering the maintenance which the law had provided for them. If a writ of dower came *in octabis* of St. Michael, day was to be given only to the morrow of All Souls; if *in quindenâ* of St. Michael, to the morrow of St. Martin; if in three weeks of St. Michael, *in octabis* of St. Martin; if in a month of St. Michael, *in quindenâ* of St. Martin; if on the morrow of All Souls, *in octabis* of St. Hilary; if on the morrow of St. Martin, *in quindenâ* of St. Hilary; if *in octabis* of St. Martin, on the morrow of the Purification; if *in quindenâ* of St. Hilary, *in octabis* of the Purification; if *in octabis* of St. Hilary, *in quindenâ* of Easter; if *in quindenâ* of St. Hilary, in three weeks of Easter; if on the morrow of the Purification, in a month of Easter; if *in octabis* of the Purification, on the morrow of the Ascension; if *in quindenâ* of Easter, *in octabis* of the Holy Trinity; if in three weeks of Easter, *in quindenâ* of the Holy Trinity; if in a month of Easter, on the morrow of St. John the Baptist; if in five weeks of Easter, *in octabis* of St. John the Baptist; if on the morrow of the Ascension, *in quindenâ* of St. John the Baptist; if *in octabis* of the Holy Trinity, *in octabis* of St. Michael; if *in quindenâ* of the Holy Trinity, *in quindenâ* of St. Michael; if on the morrow of St. John the Baptist, in three weeks of St. Michael; if *in octabis* of St. John the Baptist, in a month of St. Michael; if *in quindenâ* of St. John the Baptist, then on the morrow of All Souls. These intervals, as may easily be seen, were much shorter than those appointed by the former statute to be observed in all other actions; we shall find that many other exceptions were made thereto in succeeding parliaments.

These are followed by two statutes concerning the exchequer, both passed in the same year; the first is entitled *De Districione Scaccarii*, the other *Statutum de Scaccario*. The former speaks of the damages sustained by the commonalty of the realm through the wrongful distresses which had been taken by sheriffs and other bailiffs of the king, for the king's debts and for other causes. To remedy such evils, the statute ordains generally, that

when a sheriff, or any other man, took the beast of another, the owner of the beasts might give them their feed without disturbance, so long as they were impounded, and should pay nothing for their keep; nor was the distress to be given or sold within fifteen days after the taking. It further ordains, that no one shall be distrained by the beasts that plough his land, nor by his sheep, so long as other distress or chattels can be found sufficient whereof to levy the demand; which provision, as well as the former, has been construed to extend to the distresses of private persons as well as to those of the king. But this exception of beasts of the plough and of sheep seems not to relate to cattle *damage feasant*, which were still to be taken according to the old custom of the realm. It was, moreover, required, that all distresses should be reasonable, and according to the value of the demand. The remainder of this statute, and the whole of the other, is confined to the collection of the king's debts, and the accounting for them in the exchequer. After these statutes, in the same year, follows the *Dictum de Kenilworth*, and then the statute of Marlbridge or Marlborough, 52 Henry III., containing some provisions of a miscellaneous kind, which deserve more particular observation.

This statute was made after the long contest between the king and his barons had subsided, and the nation began to breathe from the disorders of civil war. During this period, many abuses had prevailed, some of which it was intended to remedy by this statute.

Of all the oppressions that were felt from the doctrine of tenures, none bore so hard upon landholders as the claim of wardship (a). Many devices had been practised to defraud lords of this valuable casualty. One of them was this: A tenant would, in his lifetime, infeoff his eld-

(a) Under which their children were committed to mere strangers. The following, for instance, is a curious illustration of the feudal system, under which a mother could be sued for letting her own child go with her away from his guardian. The action was for entering the plaintiff's court and taking away his ward, and the defendants, one of whom was the child's mother, pleaded, "*quod ipsi fuerunt versus Oxon, et tunc viderunt prædictum puerum, et puer percipit quod prædicta Isabella, (one of the defendants), fuit mater sua; et secutus est eam, usque domum suam, et adhuc moram facit cum ea, sed ipsi cum non duxerunt,*" etc. On these facts the court held, however, that the mother, with the rest of the defendants, was guilty—guilty of taking her own child (*Plac. Abr.*, 136, *Buck.*, temp. *Hen. III.*).

est son and heir, being within age; in consequence of which, as there was no descent of the land, there could be no ward of the infant in case the father should die. It was declared by this act that no lord should lose his ward by reason of such feoffment. Another way was, to make a feoffment in fee, reserving no rent, but supposing the feoffor to be satisfied for a certain term, which, upon calculation, would end when the heir came to full age; and then it was conditioned that the feoffee should pay a certain sum, being much more than the land was worth: as none would give so high a price, the heir used to enter by virtue of the original condition: but it was now declared that no lord should lose his ward by reason of any such feigned feoffments. Yet lords were not to be empowered to disseize persons infeoffed in that way; but they were to proceed by a writ to recover the custody. The trial, whether such feoffments were made *bonâ fide*, or in fraud of the lord, was to be by the witnesses contained in the deed of feoffment, and other free and lawful men of the country. Should the lord have judgment to recover his ward, the feoffees were still to have their action to recover the term or fee which they had therein when the heir came of age. On the other hand, it was provided that, should any lord implead feoffees, who were *bonâ fide* such, under pretence of the above-mentioned collusion, they should have their damages and costs, and the plaintiff should be amerced.<sup>1</sup>

A provision in protection of heirs against the intrusion of their guardians was partly a new regulation, and partly a declaration and confirmation of the common law. First, it was enacted, if a lord having wardship of an infant's lands would not restore them when he came of age, the heir might have an assize of mortdaunce, and recover the damage he had sustained by the withholding of the land since his coming of age.<sup>2</sup> It was moreover declared and enacted, that where the heir was of full age at the death of the ancestor, the lord should not put him out, nor remove anything, but only take simple seisin thereof (for so *relief* was sometimes called), in acknowledgment of his seignior; and if such an heir was put out, and had

<sup>1</sup> Ch. 6.

<sup>2</sup> No damages were recoverable in an assize of mortdaunce at common law. *Vide* vol. i., 368.

recourse to a writ of mortmain, he should be entitled to his damages, as in an assize of novel disseisin. It was declared that the king was to have the *prima seisin*, or *primer seisin* (which corresponded with *relief*) of his tenants *in capite*, as was used in times past; nor was the heir to have it till he had first sued livery of the land out of the king's hands, as his ancestors had before done. This was to be understood of lands and fees which used to be in the king's hands by reason of knight's service, serjeanty, or *juris patronatus*, that is, of the foundation of bishoprics, monasteries, and the like.<sup>1</sup> So great havoc had been made in the rights of persons, and of things, during the late disorders, that a parliamentary sanction was necessary to confirm some of the plainest propositions in the common law.

The law underwent some alteration in favor of a particular description of wards. It was enacted, that when land holden in socage was in the custody of the heir's relations during his minority, the guardian should make no waste, sale, or destruction of the inheritance, but safely keep it for the use of the heir; and, when he came of age, should answer to him for the issues, by a lawful accmpt, with an allowance to the guardian of his reasonable costs. Such guardians were not to sell the marriage of the heir, except for the emolument of the heir himself;<sup>2</sup> so that the privilege of guardians in socage, which heretofore had been the same as that of guardians in chivalry,<sup>3</sup> ceased to be a source of emolument. But the great lords who composed the legislature had no inclination to make the same provision in case of ward and marriage in military tenure.

Some provision was made for the better ordering of services. As to the suit of court, owing to great lords and others, it was ordained that no person infeoffed by charter need do more than the charter bound him to; excepting such suit as any one or his ancestors had been accustomed to perform before the king's first voyage into Brittany, which was thirty-nine years and a half before the statute of Marlbridge.<sup>4</sup> As to those who were infeoffed without

<sup>1</sup> Ch. 16.<sup>2</sup> Ch. 17.<sup>3</sup> *Vide ante*, 83.<sup>4</sup> In the fourteenth year of the king, before the disorders of his reign had given opportunity for the invasion of every species of property. We have before seen, that this period had been fixed for the limitation in a writ of

charter, from the time of the Conquest, or some other ancient feoffment, they were not to be distrained to do such suits, unless they or their ancestors had performed them before the above period of limitation. Further, persons infeoffed by charter to do a certain service, as to pay so many shillings in the year to be acquitted of all services, were not to be bound to any other suits or service *contra formam feoffamenti*, contrary to the terms of their feoffment. It enacts (as had before been directed where such cases happened in Ireland),<sup>1</sup> that where an inheritance descended to parceners, the eldest should do the service, and the others be contributory to her according to their portions. Where there were several feoffees of land for which only one suit was due, the lord was not to exact more than that one suit; and if the feoffees had no warrantor or mesne to acquit them, then every one of them, according to his portion, was to be contributory towards doing the service.

Thus far did this act make order for apportioning suits and services. It goes on to furnish a course of redress for those who were injured contrary thereto. It ordains,<sup>2</sup> that should lords distrain their tenants for such suits contrary to this act, then, at the complaint of their tenants, they were to be attached to appear in the king's court, at a short day, to make answer thereto. Upon this clause a writ was afterwards framed, called, from the design of it, *contra formam feoffamenti*. This writ, as it is not mentioned by Bracton, who is very particular on the subject of services, probably did not exist at common law, notwithstanding a supposed case in Fitzherbert;<sup>3</sup> besides, the writ bears an internal mark of its origin, by always reciting this statute. The remedy in such cases before was of a less concise nature than what was now proposed; for now, besides the process of attachment, the lord was to have but one essoin, if he was within the realm; and the beasts taken on the occasion were to be immediately delivered to the complainant, and so remain till the question between them was determined. If the lord did not appear upon the attachment, nor keep the day given by

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nuisance, and also in an assize of novel disseisin; though, in the latter instance at least, in direct violation of the Stat. Mert. *Vide ante*, 59, 120, 138.

<sup>1</sup> *Vide ante*, 54.

<sup>2</sup> Ch. 9.

<sup>3</sup> Avow., 243. 16 Hen. III.

the essoin, another writ went; and if that was not obeyed, then he was to be distrained by everything he had within the county, and the sheriff was to answer to the king for the issues thereof;<sup>1</sup> he was also to have his body at a certain day. If the lord came not at that day, the complainant was to go *sine die*, and the beasts and other distresses taken were to remain with him, until the lord recovered the services by judgment of the king's court; in the meantime, all further distresses for the same services were to cease, though the lord was yet to be at liberty to sue for them in form of law. If the lord came in, and upon answer was convicted, the complainant was to recover the damages he had sustained by the distress (a).

While this redress was provided for the tenant, the following was contrived for the lord. If tenants  
Distresses.
 withdrew from their lords such suits as they had continued to perform before the above period of limitation, then the lord of the court to which suit was owing was to recover it with damages, by the same speedy justice as to the limiting of days, and the awarding of distresses, as was above provided for tenants. It was enacted, also, that lords should not recover seisin of such suits against their tenants by default, as was the old course at common law.<sup>2</sup>

Many provisions had been made in the former part of this statute concerning distresses. It complains that, during the late troubles, great men and others refusing to abide the order of the king's courts, and the due course of the law, took upon them to be their own judges in their own causes, and revenged themselves of their neighbors by taking distresses, till they had fines and ransoms

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(a) In the commentary upon this statute in the *Mirror*, it is said: "Some points in this statute are reprobable, viz., the first five points, because every personal trespass is punishable by a *corporal* punishment, if the trespass be not compounded for by ransom, according to the quality thereof" (*Mirror*, c. v., s. 3). That is, that there ought to be fine or imprisonment, and not mere damages. "The chapter which commands the Great Charter to be kept is defective for want of additional punishment. The chapters remedial as to lords of fees is reprobable for mitigation of punishment, for all who so defraud the law are punishable by corporal punishment, and not by mere amercement," *i. e.*, in damages (*Ibid.*).

<sup>1</sup> That is, the process was to be an attachment, and then another attachment *per miliores plegios*, and then the last distress. *Vide ante*, 259, 260, and *post*, 335.

<sup>2</sup> Ch. 6.



paid at their pleasure. Others, again, would not be justified, that is, submit to the king's officers, nor suffer them to make delivery of such distresses as they had taken of their own authority, though without any pretence of right to justify them. To remedy these disorders, it was now enacted and enjoined that they should not be any longer endured; and, further, that any person taking revenge, without a judgment of the king's court, should be punished by a fine according to the offence;<sup>1</sup> in the same manner of a distress made without authority (a).

(a) The practice here denounced was that of taking revenges for injuries in other instances than those allowed by law. The "revenge" meant taking cattle or goods as a distress, to enforce a demand which ought to be enforced at law, not taking cattle as a distress for doing damage, distress "damage feasant," which was allowed by law. Hence several passages in the Saxon laws which prohibit taking distresses until the right has been claimed at law, and default has been committed by defendant, supply the best possible commentary upon the ancient statute of Marlbridge. The terms of the statute are, "Et nullus de cetero ultiones aut *districciones*, faciat per voluntatem suam absque consideratione curiæ domini regis, si forte dampnum vel injuria sibi fiat unde emendas habere voluerit de aliquo vicino suo sive majore sive minore." Here it will be seen that "revenges" and "distresses" are spoken of as identical, upon which Lord Coke observes in his comments on the law:—"Ultiones:" that they, refusing the course of the king's laws, took upon them to be their own judges in their own causes, and to take such revenges as they thought fit, until they had ransom at their pleasure. "*Districciones*:" that is, *taking distresses*, not according to law; as for rent services, or for damage feasant, or for other lawful cause; but for revenge, without cause, of his own head and will—that is, to be his own judge, and lawyer—to satisfy himself without any lawful means or course of law (2 *Institutes*, p. 303). Here it will be seen that Lord Coke recognizes the right of distress for rent, and for *damage feasant* on the land of the party distraining. The statute itself recites that the great men refused to be bound by process of law, and took upon themselves to be judges in their own causes, and to take such revenges or distresses as they thought fit, until they had ransom at their pleasure; and it enacted that no person should take revenges or distresses of his own will without legal process (2 *Inst.*, 103). Thus it also provided (s. 15), that no subject should *distrain out of his own land* (2 *Inst.*, 131). It is clear, therefore, that the mischief was that men took distresses, not where allowed by law, as for rent or *damage feasant* (in both which cases it would be on their own land), but off their land, to enforce real or pretended claims for redress for injuries or payment of debts; and it is thus beyond a doubt, which is declared illegal, as undoubtedly it always has been by the law of this country. Distraining of goods was indeed allowed at common law, as part of the process of the courts, to enforce appearance in a suit; and in that way it was under the authority of the law, and the object was to prevent its being done *without* such authority. Such a distress was afterwards called *distringas*.

<sup>1</sup> Lord Kaimes is certainly mistaken, when he relies upon this provision of the Stat. Marl., to show that it was a practice warranted by our old law to force payment of a debt by taking, at short hand, a pledge from the debtor. The distresses here meant are mentioned by the act as *breaches* of the law, and do not correspond with *pounding* in the *Scotch Law*. Kaimes' Law Tracts, 158. Ersk., b. 3, tit. 6, sec. 2.

Besides such fine, amends were to be made to them who had sustained any damage by the distress.<sup>1</sup> Moreover, it was declared, that none should distrain any person to come to his court, who was not within his fee, or within his hundred or bailiwick; nor was any to take distresses out of his fee or place where he had a bailiwick or jurisdiction; all which, like the provisions of the former act, were nothing more than declarations of the law as it stood before; only in this, as in the former case, it was ordained, that persons offending against this act should be punished in damages and fine, as above mentioned, according to the nature of the fact.<sup>2</sup> Again, if any would not permit such distresses as he had taken to be delivered by the king's officers, according to the law and custom of the realm, or would not suffer process of summons, attachment, or execution of judgments of the king's courts to be done according to law, he was to be punished in the above-mentioned way, as one who would not be justified by the law of the land.

The former chapters of this statute inflicted punishment where the distress was unlawful, or the person distraining had no seignior, or jurisdiction at all, or distrained out of his fee or jurisdiction. The following provision was made respecting distresses that were lawful. It directs, that where a lord distrained his tenants for services and customs due to him, or for anything which gave the lord of the fee a right to distrain, and it was afterwards found that the services were not in arrear, the lord should not be punished by fine, as in the above cases, if he suffered the distress to be immediately delivered according to the course of law; but should be amerced only in such manner as had hitherto been used, and the tenant should recover his damages against him.<sup>3</sup> The general construction of this chapter has been, that an action of trespass was hereby taken away in such cases;<sup>4</sup> though, from the bare words of the act, there seems to have been no such design in the legislature, but merely to exempt distresses of this kind from any conclusion which might possibly be drawn from the former provisions respecting distresses that were wholly unlawful.

It was declared and enacted, that no one should drive a distress out of the county where it was taken; and if one

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<sup>1</sup> Ch. 1.<sup>2</sup> Ch. 2.<sup>3</sup> Ch. 3.<sup>4</sup> 2 Inst., 106.

neighbor did so to another, of his own will, and without any lawful right, he was to be punished by fine, as for an offence *contra pacem*. Nevertheless, if a lord did so towards his tenant, he was to be proceeded against in another way, and only amerced heavily. It was declared, that distresses should be reasonable; and that those who took unreasonable and improper distresses, should be heavily amerced for the excessiveness thereof.<sup>1</sup>

As the king had, by his prerogative, a right to distrain for rent in any of his tenants' lands, though they were out of his fee and seigniory, several lords had taken upon themselves to do the like; but it was now enacted, that no man should, for any cause whatsoever, take a distress out of his fee, or in the king's highway, or in the common street, except only the king, or his officers having a special authority for so doing.<sup>2</sup>

The only remedy in case of distress was a writ of replevin, the manner of proceeding in which is still fresh in the reader's memory.<sup>3</sup> Some time was required before a replevin could bring relief to the owner of the goods or beasts; and this delay was greatly increased when the distress was impounded within a liberty that had return of writs; for the sheriff could not, in general, act within such franchise in person, but was to make a warrant to the bailiff thereof, ordering him to make deliverance.<sup>4</sup> To remedy such inconveniences as might arise from these exclusive jurisdictions, it was provided by another chapter of this statute, that where the beasts of any man were taken, and wrongfully withheld, the sheriff, upon complaint made to him, might deliver them without any impediment or contradiction of the taker, if they were taken *out* of a liberty; and if taken *within* one, and the bailiff thereof refused to deliver them, then the sheriff, upon their default, might himself make a deliverance of them.<sup>5</sup> Thus was the sheriff confirmed in his<sup>6</sup> power to make replevin without a writ; and, either by parole or by precept, either in or out of the county court, he might now command his bailiff to deliver the distress; a very great improvement in the proceeding by replevin.

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<sup>1</sup> Ch. 4.<sup>2</sup> Ch. 15.<sup>3</sup> *Vide ante*, 308.<sup>4</sup> *Ibid.*, 306, in what manner Bracton states the authority of the sheriff in this particular.<sup>5</sup> Ch. 21.<sup>6</sup> *Vide ante*, 308.

Another abuse of the summary process by distress, was endeavored to be removed by chap. 22 of this statute,<sup>1</sup> which ordains, that none should distrain his freeholders to answer for their freeholds, nor for anything touching their freeholds, without the king's writ; nor should any cause his freeholders to swear against their wills; because, says the act, no man has any authority to do that, but by the king's command. It should seem, that, before this, lords would by distress compel their tenants to discover their title-deeds, and show by what services they held, and so lay them open to litigations and contest: a proceeding more harsh and unpopular than even that by *quo warranto* or *quo jure*, which was calculated to attain the same object, and was, unfortunately, justified by law.<sup>2</sup> The swearing here is supposed to mean the discharge of their duty in the court baron and hundred court, where the freeholders were *sectatores* and judges, and were sometimes forced, by oppressive distresses, to give their verdict *on oath* between party and party, according to the pleasure of the lord.<sup>3</sup>

The remaining part of this statute relates to the general administration of justice, either civil or criminal. We shall first consider what concerns the former. Of this, the first is the chapter upon *beaupleader*. It seems, that bailiffs and judges of inferior courts had followed the example, set by kings of England, of selling justice, and used to take fines of suitors for a fair or perhaps favorable hearing of their cause; which fair hearing was called *pulchrè placitare*, or *beaupleader*. It was ordained, that neither in the itinera of the justices, nor in the counties, hundreds, nor courts baron, should any fines be taken *pro pulchrè placitando, nec per sic quodd non occasionentur*.<sup>4</sup> That this is the meaning of *beaupleader*, and not that it was a fine for amending a wrong plea,<sup>5</sup> seems probable from a passage in the *statutum Walliæ*, and from the manner in which the author of *Fleta* speaks of this fine: *Nititur*, says he, *dominus vel ejus senescallus ipsos OCCASIONARE, arguendo, et redarguendo, donec finem fecerint pro pulchrè placitando*.<sup>6</sup> The statute says, *Viccomes verò, in veredictis, et recognitionibus admittendis, non quærat OCCASIONES versus præsentantes, nec capiat ab eis fines per sic quodd non OCCASIONENTUR*;<sup>7</sup>

<sup>1</sup> Ch. 22.<sup>4</sup> Ch. 11.<sup>7</sup> Stat. Wall., 12 Edw. I.<sup>2</sup> *Vide ante*, 211.<sup>5</sup> 2 Inst., 122, 123.<sup>3</sup> 2 Inst., 142.<sup>6</sup> *Flet.*, 147.

which, at least, has no reference to pleading. Upon this statute a writ was framed to relieve those who were distressed for any fines of this kind.<sup>1</sup>

In furtherance of proceedings in court, it was provided, that charters of exemption and liberties, granting that certain persons should not be impanelled in assizes, juries, or recognitions, should not operate as an impediment to justice; but that where right could not be done without them, as in the great assize, in perambulations, and in charters and deeds of covenant where they were witnesses, and in the like cases, they should submit to be sworn; saving, however, their franchise in all other cases.<sup>2</sup>

When a court baron had given a false judgment, it seems, the regular order of appeal was to the court baron of the lord next above, and so upwards to the chief lords; but if the next immediate mesne lord had no court, the judgment could not be redressed in the court of the next superior, for want of privity, and recourse was to be had to the bench, or the justices in eyre.<sup>3</sup> This series of appeal occasioned great delay and expense: to prevent which it was provided, that none, except the king only, should hold plea of false judgment given in the court of his tenants; for such pleas, says the statute, *specialiter spectant ad coronam et dignitatem domini regis*.<sup>4</sup> False judgments were thenceforward to be heard in the common pleas and the eyre. A great inducement to the king for depriving inferior courts of this subject of jurisdiction, and bringing it immediately into his own court, was, that the fines to be imposed for false judgments were thereby brought under the immediate cognizance and direction of the king's justices (*a*).

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(a) Attention has already been drawn to the important influence of this matter of fines, or fees, or amercements, and other pecuniary impositions or penalties upon the administration of justice. It has been seen that there is every reason to believe that the interest the Norman sovereigns took in the administration of justice arose entirely from their finding that it could be made a source of revenue, and that the attention they paid to it was directed almost altogether to that object. There is, it has been shown, every reason to believe that the sending of justices itinerant into the counties, and the institution of a regular judicature—the establishment of superior courts—were all dictated by this motive; and that to the same motive may be ascribed the various devices invented and resorted to in order to discourage litigation in the local courts, to remove it into the superior courts, and to convert them into courts of ordinary and primary jurisdiction. The steps

<sup>1</sup> Flet., 147.

<sup>2</sup> Ch. 14.

<sup>3</sup> 2 Inst., 138.

<sup>4</sup> Ch. 20.

The power of amercing for defaults was exercised by all persons authorized to make judicial inquiry; and this power was exercised in a manner not wholly satisfactory. An act, to the following effect, was therefore made to redress this. It was ordained, that no escheator, or inquirer (which is said to signify sheriff, coroners *super visum corporis*, and all those who received power to inquire in special cases)<sup>1</sup>, or justice assigned specially to take certain assizes, or to hear and determine certain complaints, should any longer have authority to amerce for default on the common summons; and, in short, none but the *capitales justitiani in itineribus suis*.<sup>2</sup>

Among the alterations made for the improvement of judicial proceedings, that which concerned the writ of entry was of great importance (a). We have seen, that this new remedy was confined to certain degrees, which gave a denomination to the different writs, some of which were thence said to be in the *per*, and others in the *per* and *cui*.<sup>3</sup> This was a check upon the application of the writ of entry, which, in other respects, was of a general import, and capable of being further extended. With a view to this, it was ordained, that if those alienations upon which a writ of entry used to be had, were so many degrees removed, as not to be properly within it, the complainant should have a writ to recover his seisin, without mention of the degrees, into whatsoever hands the

by which this was accomplished have been, in some degree, traced and described in the Introduction, where, however, attention was not fully called to the various modes adopted for encouraging removal of causes from inferior courts, and the various means provided for the purpose. The effect happily was, in the result, to improve the administration of justice, at a period when nothing could effect an improvement except a regular judicature.

(a) "It is to be observed, that the common law provided for the quietness of men's freehold and inheritance, and that they should not be disturbed" (*i. e.*, in their possession) "insomuch as he that had right could not enter upon him that came in by descent or lawful conveyance, but was driven to his writs of entry" (*i. e.*, to his suits at law), "and the common law, for the safety of men's possessions, further provided that, if the land were conveyed out of certain degrees—the demandant was driven to his writ of right (a long and final remedy) to the end that suits might have an end; and that he who had right should take his remedy by writ of entry before there were above two descents or conveyances, and also within the time of prescription" (2 *Inst.*, 153). This was distinguished from the assize of novel disseisin, which was, as Lord Coke says, "*festinum remedium*, and much favored in law for the relief of the disseinee in regaining possession of his stock of cattle and goods" (2 *Inst.*, 236).

<sup>1</sup> 2 *Inst.*, 136.

<sup>2</sup> Ch. 18.

<sup>3</sup> *Vide ante*, 184.

land should have come by such alienation: and this, says the statute, shall be *per brevia originalia per concilium domini regis providenda*.<sup>1</sup> In pursuance of this permission, a new writ was formed, called a *writ of entry in the post*, because, instead of specifying the particular steps by which the alienation had happened, it said, generally, that *post* such alienation, etc. This new writ, from its indefinite nature, was applicable to almost every possible case of ouster of freehold, and tended to make the writ of entry a still more general remedy.

There were two defects in the law, as some thought, respecting the property of abbots, priors, and other religious persons and societies, which it was now endeavored to remove: first, if the goods of a monastery were taken away in the time of a predecessor, it was an opinion, that, after his death, the successor had no remedy for the trespass: the other defect was, that, if in the time of a vacancy, when there was no abbot or prior (or whoever might be the head), any intrusion were made, the successor had no remedy to recover the land with damages, though the predecessor died seized thereof: both these were now remedied.<sup>2</sup>

Several provisions were made for improving the process of law. By one act it was provided, that if bailiffs, who ought to account with their lords, withdrew themselves, and had no lands or tenements by which they might be distrained, they should be attached by their bodies, so as the sheriff might cause them to come to render an account.<sup>3</sup> Thus was a process against the person framed upon this statute, beginning with *Monstravit nobis A. quoddam B. ballivus suus, etc.*,<sup>4</sup> of which, and the action of account, more will be said in the next reign. While this care was taken for securing the regular accounting of bailiffs, the interest of the lord was again consulted by another provision, that restrained farmers from making waste. It is the opinion of some,<sup>5</sup> though not, as it should seem, well founded,<sup>6</sup> that there was no remedy at common law for waste, except against a tenant by courtesy, in dower, and a guardian (a).

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(a) This is very important, as the first statutory enactment of the process of arrest for debt, or mere civil demands. At common law, arrest, it should seem, was only allowed in cases of trespass with force; which was deemed an offence against the king, although venial, and admitting of satisfaction

<sup>1</sup> Ch. 29.

<sup>2</sup> Ch. 28. 2 Inst., 151.

<sup>3</sup> Ch. 23.

<sup>4</sup> Fleta.

<sup>5</sup> 2 Inst., 299.

<sup>6</sup> *Vide ante*, 174.

These being, say they, estates created by operation of law, the law likewise provided that they should not be abused; but such interests as were conferred by agreement between man and man, were left wholly to the terms of such agreements: and if there was no provision made therein by the parties themselves, the law would make none for them. But the common law was otherwise; and it was now enacted, in confirmation thereof, that farmers (which signified as well those for life as for years), during their terms, should not make waste, or exile of woods, houses, or men, nor of anything belonging to their farm, unless they had

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to the party along with a fine to the king. It is said, indeed, in the *Mirror*, in treating of personal actions, that the defendants were distrained or attached to the value of the demand; and for default, after default, judgment was given for the plaintiff, but that this usage was changed in the time of Henry I. (query Henry III.), so that no freeman was to be distrained (or attached) by his body for a personal action venial, so long as he had *lands*, as to which the judgment by default was in force till the time of Henry III., that the plaintiff should hold the land until due satisfaction was made (c. iv., s. 5). It is further said, that in personal actions venial, where the defendants had not freehold land, the process was first awarded to arrest their bodies, and then they were outlawed (c. vi.). But this, it is to be presumed, meant cases of trespass, as it would not be consistent with what had already been said, and there is no doubt that at common law the first process was summary, then distress or attachment of goods. This is what had been previously alluded to in the clauses as to distress, or rather *distringas*, to compel satisfaction for alleged injuries, no one having a right to levy such distresses, except on *his own land*, for rent or *damage feasant*. Thus it is said in a subsequent section of the *Mirror*, that where the king commands the sheriff (as in an original writ) that he command such a one to appear, and if he do not, then that he summon or attach the defendant; in which case, if the sheriff had not *warned* the tenant to appear, he would not take surety, etc. (s. 9). Elsewhere it is said that personal actions are commenced by attachments of the body real by summons, and mixed actions first by summons and afterwards by attachment (c. iii., s. 6); but the context shows that the section is treating of trespasses, false imprisonments, etc.; and mixed actions are defined to include contracts and distresses, etc., and that they are called "mixed" by reason of the mixture of process. So that it is clear that "personal actions," in the *Mirror*, means actions for trespasses to the person, and that in all others the first process was summary, and attachment even of the goods was not allowed until after default upon summons; and arrest of the person was not allowed where the defendant had immovable property like land, the principle obviously being that arrest (before judgment) was only for security, and that if a man had land, which could not be removed, and the seizure of which would be an ample security, he should not be arrested, except for an offence against the king, committed with personal violence. But then this principle did not apply when the parties had no lands, and withdrew themselves with their personal goods, so that there would be no security without their arrest, and hence the present enactment, limited in the first instance to actions of account, but afterwards extended to all other personal actions, or rather actions as to personalty. As to actions for recovery of realty, the old principle still applied.



a special license or covenant for so doing: and if they did, and were convicted thereof, they should refund full damages, and be heavily punished by amercement.<sup>1</sup>

The other parliamentary regulations about process were as follow: Chap. 7 speaks of *the common writ de custodia*; of which there appears no mention in Glanville nor Bracton. It should seem, however, that this meant *the writ of right of ward*. The process in this, as in most other personal actions, was summons, attachment, and distress. This was thought not sufficiently compulsory, where the possession of the ward was, probably, of more value than all the lands and goods which were taken by the distress. A new course was therefore devised; and it was enacted, if the deforceors came not at the great distress,<sup>2</sup> then the same process should be repeated twice or thrice, within the next six months, and be read openly in the county court: and that proclamation should be made for him to appear at a day limited; and if he came not at the end of half a year, according to the proclamation, he was to lose the seisin of the ward, as a rebel, and one who would not abide the judgment of the law. If a custody was demanded against one who held it by reason of ward, the process ordained by this statute was not to lie; but that proceeding was left to the course of the common law.<sup>3</sup>

The process in several actions was altered in the following way: Not satisfied with the special exception already made from the *dies communes*, in favor of process in dower *unde nihil* (a),<sup>4</sup> the parliament now declared in a general

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(a) This is worth notice as the earliest enactment of judgment for default of appearance. Lord Coke, in his reading upon this statute, says: "Put the case then upon the summons, the defendant is returned *nihil*; and at the attachment for distress *nihil* also. This case is out of the letter of the statute, because the defendant was never *summoned*; but it is said, that when there be two mischiefs at the common law, and the lesser is provided for by express words, the greater shall be included within the same remedy. And this case, where *nihil* is returned, is the greater mischief; for he (the defendant) by his default shall lose nothing; but in the case provided, the defendant by his default shall lose issues; and the law intends that he will rather appear than lose issues" (2 *Inst.*, i. 24). This is worth notice, as the earliest illustration of the liberal construction put upon remedial statutes.

<sup>1</sup> Ch. 23. This latter clause, about waste, is made a separate chapter in 2 *Inst.*, and is numbered as the twenty-fourth chapter; which makes this statute contain thirty chapters in that author, though in the common editions it has only twenty-nine.

<sup>2</sup> By the great distress is meant the *last* and most compulsory of the four processes of *distringas*.

<sup>3</sup> Ch. 7.

<sup>4</sup> *Vide ante*, 321.

way, that *dentur quatuor dies per annum ad minus*, and more if conveniently could be, so that they should have five or six in the year at least.<sup>1</sup> In assizes *ultimæ præsentationis*, and suits of *quare impedit*, of churches vacant, days were to be given from fifteen to fifteen days, or from three weeks to three weeks, as the place happened to be near or remote; and in a *quare impedit*, if the disturber appeared not at the first day of summons, nor cast an essoin, he was to be attached; and if he did not appear to that, he was to be distrained by the great distress. If he still made default, a writ was to go to the bishop of the place to prevent the lapse (a). This shortening of the process in *quare impedit*, was only confirming a practice<sup>2</sup> established (though as Bracton says without sanction of the law) by the courts upon their own authority. It was further enacted, in all cases of attachment, that the second attachment should be *per melioris plegios*, and then should follow immediately the last distress:<sup>3</sup> a regulation which put the first check upon the *solennitas attachiamentorum*<sup>4</sup> and the four processes of *distringas*.

In order to save some of the grievous delay occasioned by essoins, it was enacted, that after any one had put himself upon an inquest, no party should have more than one essoin, and one default.<sup>5</sup> As no inquest could be taken by default in a real action, this provision has been held to

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(a) This is remarkable as the first known enactment in our law of a power to give judgment by default, though there is some obscure intimation in the *Mirror* of a practice in personal actions to allow judgment by default; and it should seem that in this action of *quare impedit*, for the particular reason assigned—to prevent a lapse—such a practice had arisen. In the *Mirror* it is said that in real actions the practice in case of default was to seize the defendant's land, to the value of the demand, to be adjudged to the plaintiff to hold as a distress; "but this was only to enforce appearance, and so as to mixed actions, the defendants were distrainable by all their movable goods, until they appeared and answered" (c. iv., s. 7, 8). As to personal actions, it was said that the defendants were distrained to the value of the demands, and for default after default judgment was given for the plaintiff. This, however, it should seem, was only as a distress; for it is added, that the body was not to be seized so long as the defendant had lands, as to which the judgment by default was of force till the reign of Henry III., that the plaintiff should hold the land until *due satisfaction made* (c. iv., s. 5). It was not until ages afterwards that final judgment by default was allowed, except in *quare impedit*.

<sup>1</sup> Under the former statute the returns were about five in a year. The common returns in the statute of *dies communes* are not more than two in a year.

<sup>2</sup> *Vide ante*, 147, 148.

<sup>3</sup> Ch. 12.

<sup>4</sup> *Vide ante*, 258, 263.

<sup>5</sup> Ch. 13.

relate to personal actions only.<sup>1</sup> Again, no one was to be obliged to swear, as had been the practice, to warrant the truth of an essoin:<sup>2</sup> though the statute speaks generally of essoins, this provision has been held to apply only to the common essoin *de malo veniendi*, so that the practice of swearing the warrant of other essoins still continued.<sup>3</sup> Warrantors in pleas of land were exempted from a fine for non-appearance at the summons of justices in eyre, but were to be further warned to appear.<sup>4</sup>

The last provision on the subject of process was to give effect to a regulation made by the statute of Merton about redisseisins. It had been directed by that act,<sup>5</sup> that a person guilty of redisseisin should be committed to prison, till he was delivered by the king, *vel aliquo alio modo*. Under these last words, such persons used to be delivered by the common writ *de homine replegiando*.<sup>6</sup> To prevent this in future, it was now ordained, that they should not be delivered *sine speciali præcepto domini regis*, and that they should also make fine with the king for the trespass. If the sheriff delivered them any otherwise, he was to be grievously amerced; and the person so delivered was to make fine for the trespass.<sup>7</sup> Thus far of the provisions of this statute relating to civil matters.

Some few alterations were made in our criminal law by this statute. The splendid appearance of the sheriff's tourn was wholly diminished by a law, which ordained that archbishops, bishops, abbots, priors, earls, barons, or any religious man or woman, should not be obliged to attend there, unless they had some special business; but the tourn in other respects was to be held as formerly, in the time of *Magna Charta*, and of the reigns of King Richard and King John. Those who had tenements in different hundreds were not to be obliged to attend the tourn, except only in the district where they were most conversant.<sup>8</sup> The attendance before the sheriffs and coroners was virtually dispensed with in another instance. It was declared, that the justices in eyre, in their circuits, should not, in future, amerce townships, because all such as were twelve years of age came not before the sheriffs and coroners to make inquiry of robberies, burnings, and other

<sup>1</sup> 2 Inst., 126.

<sup>2</sup> Ch. 19.

<sup>3</sup> 2 Inst., 127.

<sup>4</sup> Ch. 26.

<sup>5</sup> Namely, c. 3. *Vide ante*, 58.

<sup>6</sup> 2 Inst., 115.

<sup>7</sup> Ch. 8.

<sup>8</sup> Ch. 10.

things appertaining to the king's crown, provided there were sufficient others of the townships to make inquisition. However, it was still required, that in inquisitions for the death of a man, all persons twelve years old should appear, unless they had a reasonable excuse for their absence.<sup>1</sup>

A provision was made on the subject of *murder*, which has created some difficulty among modern lawyers. *Murdrum*, says the statute, *de cætero non adjudicetur coram justitiariis, ubi infortunium tantummodo adjudicatum est; sed locum habeat murdrum in intersectis per feloniam, et non aliter.*<sup>2</sup> The fine called *murder*, which has been so often mentioned, though by the general law only due upon a secret felonious killing, yet, as appears from Bracton,<sup>3</sup> was by the particular custom of some places exacted in other cases of homicide, and even in such as were not felonious. The object of this statute, therefore, was to abrogate such customs, and reduce the whole law of the realm to a uniformity. This is very different from the opinion of those who imagined the *murder* here spoken of to signify the fact of killing; and that the statute ordained, that killing *per infortunium* should not be deemed felonious, or murder.

The other regulation concerning matters of crime was this: that where a clerk was arrested for an offence, and was afterwards by the king's command let to bail, or replevied, with a condition, that they to whom he was let to bail, should have him before the justices; such sureties and such bail, if they had his body before the justices, were not to be amerced, though he refused to answer, and claimed his privilege of clergy:<sup>4</sup> a provision which seems dictated by such plain and obvious justice, that one may wonder how it ever should be thought necessary to be secured by statute.

These were the alterations and confirmations of the common law made by the statute of Marlbridge, 52 Hen. III., to which may be added a chapter, whose substance was frequently repeated in the following reigns. This required, that *Magna Charta* should be observed in all its articles, as well those relating to the king, as to others (a); and it was directed, that this should be inquired of

(a) Upon this, the commentator in the *Mirror* shrewdly observes, "The chapter which commandeth the Great Charter to be kept in all points is de-

<sup>1</sup> Ch. 24. *Vide ante.*

<sup>2</sup> Ch. 25.

<sup>3</sup> *Vide ante*, 284.

<sup>4</sup> Ch. 27.

before the justices in eyre in their circuits, and before sheriffs in their counties. Writs were to be granted *gratis*

fective, for want of provision of *punishment*, and it seems idle to make *constitutions not holden*" (*Mirror*, c. v., s. 7). That was written after the statute of Marlbridge, which was in the 52d Henry III., that is more than half a century after Magna Charta had been first granted by the king, and a quarter of a century since it had been *confirmed* by him; and yet the commentator treats it as idle, it had been so little observed! And in the same chapter of the *Mirror* we find a long catalogue of "abuses," most of them in violation of the charter. The great difficulty of the age, however, was in *enforcing* the law; and that difficulty would not have been met, as the commentator in the *Mirror* appeared to suppose, merely by enacting punishments for breaches of the charter, for still the difficulty would have been in the execution of the law. The difficulty lay in the want of *purity* and the want of *power* in the administration of justice. It was in vain to declare the rights of the subject, and it would have been as vain to enact punishments for their infraction, there being not sufficient honesty or not sufficient strength in the courts of justice to pronounce and enforce judgments which should vindicate and protect these rights. The whole of the reign was occupied in endeavors to effect the object. When the charter was confirmed, the itinerant justices were ordered to summon all knights and freemen to their courts, and to administer to them an oath—that they would keep the peace and observe the good and lawful customs of the realm. But what were oaths in those times of turbulence and violence? Later in the reign the law was, as the Parliament of Oxford insisted, that four knights should be chosen by the freeholders of each county to ascertain and report to parliament the excesses and injuries committed within the county by the ministers of the king and the itinerant justices themselves. But what manner of protection they were may be gathered from the fact, that the chief justiciary, appointed by the barons, surrendered the whole body of the Jews in London to plunder and massacre (*Lingard* v. 2, c. vi.). There was no real guarantee for liberty and law until the authority of parliament was established (*vide post*). "Volons nos que generale crie soit fait solempnement par les marches, cytes, et burghes, par tout le counte, etc. Et que le visconte du pays est illonques trestans les brefs que ajournes outre este jesques en eyre, et toutes les assises de novel disseisin de mort d'ancestor, et de dower, etc. Et manudrouns a nos justices de banks, que trestans les pleas del counte adjournent et enneyent devaunt nous ou devaunt ceux justices errantre en cet counte, essint que ils soient a certain jour. Et quant a la venue de nos justices volons nos que comme ils serront venues la ou il deyrent eyrer q'ils monstrent, le poer que ills averount de nous par nos lettres patentes et en audience del people les facent lire, et puis celui que primis serra nos ne en celes lettres, nostre et die al people les enchesons et les profités de leur venue en cel counte" (*Britton*, c. ii.). "Au commencement soient enquies, oyer et terminer les veus articles et chapitres presentes en le darreyn eyre eis cel counte, etc." (c. iii.). Now, these extracts from Britton have been given with the object of explaining that justices in eyre were justices itinerant of a larger jurisdiction than ordinary justices itinerant, coming with a larger commission, to hear and determine all matters, civil or criminal, apparently without any limitation; whereas the justices itinerant appear, as has been already seen, to have had only a jurisdiction over pleas of the crown, with a limited jurisdiction in smaller civil matters. Both Britton and the *Mirror* were of the reign of Edward I., whereas Bracton, upon whom our author founds his account, wrote in the latter part of the present reign; but there is, it will be seen, an entire accord between what is said by Britton as to justices in eyre, and by Bracton as to justices itinerant.

against such as offended therein, returnable *coram rege, coram justitiariis in banco*, and before the justices itinerant; the like of the Charter of the Forest: all offenders of this kind were to be grievously punished.<sup>1</sup>

In the meantime the legislature of the national clergy were employed in framing regulations, that were considered as binding to a certain degree, like those of the parliament. Several synods were holden during this reign; some by archbishops, and some by the pope's legates. The former were *provincial*, the latter *national* councils; the *constitutions* made in the former are accordingly called *provincial*; but those in the latter, *legatine*. Of the canons and constitutions made in these assemblies, many have come down to our times. These form a kind of national canon law; and as such, were better received than the pontifical law, which had been introduced into the kingdom in the reigns of Henry II. and John (a). From the parliamentary appearance of those assemblies, their laws carried in them some similitude to acts made by the legislature of the kingdom. The subjecting the church and clergy to such an authority seemed reasonable, consistent and safe. Among the legatine constitutions of this reign, the most distinguished are those of Cardinal *Otto*, made in a council held in 1220; and those of Cardinal *Ottoboni*, in one held in 1268 (b).

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These justices by degrees superseded the county courts. In the *Leges Henrici Primi* there is a chapter on the county court which commences thus: "Judices regis sunt barones comitatus," which Spelman considers — no doubt truly — to mean the freeholders of the county. Originally, as seen in the Saxon laws, and as stated by Lord Coke, all who held by military tenure were called "thanes" or "barons;" those who held of the king being called king's thanes or greater barons, the others lesser thanes or barons. The system of tenure originally comprised all freeholders, as appears by the *Mirror*, and they were the suitors and judges in the county courts.

(a) It has already been seen what an exaggerated and incorrect idea our author had of these pontifical laws, which were simply the same as the old Saxon laws of the country. And it may be conceived how little likely it was that constitutions and canons, enacted under papal legates, would be one whit less papal than the papal constitutions themselves. Yet, such is the force of traditional prejudice, that because it had become a national habit to feel and express dislike to anything papal, the very same constitutions which were denounced by the author in a former chapter as papal, are here represented, rightly enough, as being the most natural things in the world, in a Roman Catholic country with a Roman Catholic Church.

(b) Dr. Lingard says that many of the canons which Cardinal Ottoboné published, relating to commendaries, residence, dilapidations, repairs, and

<sup>1</sup> Ch. 5.

These constitutions, whether provincial or legatine, are principally taken up in such matters as peculiarly belonged to the consideration of a national assembly of the clergy. The life and conversation of churchmen; the due administration of spiritual things; whatever related to religion or to manners; such are the objects upon which these clerical ordinances are mostly employed. But among these godly and sober regulations, there are certain constitutions of a famous prelate that breathe nothing but the spirit of clerical ambition. These are the constitutions of Boniface, Archbishop of Canterbury. This determined successor of Becket had set on foot all the claims so steadily urged by that famous martyr in the cause of the church; and resolved, by a legislative act of the convocation, at once to establish them for law, at least as far as they could be established by the sanction of an ecclesiastical synod.

By the authority of a convocation held A. D. 1261, he ordained, that if any archbishop, bishop, or other inferior prelate, should be called by the king's letters before a secular judicature, to answer respecting matters that were known to concern merely their office and court ecclesiastical; as, whether they had admitted, or not admitted clerks to vacant churches; whether they instituted, or did not institute rectors; whether they had passed excommunication or interdiction; whether they had consecrated churches, celebrated orders, taken cognizance of causes purely spiritual, as tithes, oblations, bounds of parishes, and the like (which, says the constitution, cannot concern the secular court) (a); whether they had taken

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the plurality of benefices, still retain the force of law in the ecclesiastical courts. Otho, his predecessor, had vainly attempted to abolish the abuse, which was so prevalent in England, of bestowing a number of benefices on the same person. On the present occasion, some of the prelates appealed from the legate to the Pope, but were induced to withdraw their appeal; and indeed, adds the learned historian, it would not have succeeded. So inexorable was Clement on the subject that, as soon as he learned that his nephew possessed three benefices, he compelled him to resign two (*Lingard's Hist. Eng.*, v. ii., c. vi.). From this we see that the national prelates were sometimes in favor of abuses, and that the papal authority was sometimes exercised for their repression. Our author, in another chapter, shows this.

(a) This certainly was otherwise, according to the view of the English law as it was then settled and understood, and it has already been shown that, according to the principles of the canon law itself, the ecclesiastical law could only interfere with the secular courts in matters within their province, upon the ground of a recognition of the ecclesiastical power by the law

cognizance of sins, or excesses, as perjury, *fidei læsio*, or breach of faith, sacrilege, violation or perturbation of

of the land. So that, even upon canonical principles, the right of the church to interfere with such matters would depend upon the degree in which her power was recognized by the law. Now, as to this, the result of the struggle which had taken place in the reign of Henry II. had been undoubtedly to work some alteration in the law, and to settle it upon a basis far less favorable to ecclesiastical power than as it had been before understood. As already observed, in commenting on the Constitutions of Clarendon, although they were not *per se* of statutory authority, and the degree to which they were law would depend upon the extent to which they had been afterwards incorporated with the law by actual use and adoption, they had certainly to a large extent been so used and adopted, and had greatly altered the law. For instance, in the treatise of Glanville, written at the close of the reign of Henry II., it is (as already stated) laid down as clear law that the right of advowson or presentation was of secular cognizance, and that prohibition would go to the ecclesiastical court if it took cognizance thereof (*Glanv.*, lib. v., c. viii., ix.), although if a question arose between clerk and patron, or between two clerks — as to institution, not presentation — it should be decided in the ecclesiastical court (*Ibid.*, c. viii., ix.). The principle involved is this, that wherever temporality was annexed to spirituality, the former should draw the latter into the king's court, and not the latter the former into the ecclesiastical court, was laid down and expounded by Bracton in his great treatise, and applied to various cases. And however illogical this might appear to be upon his own principles, that the principal would draw to it the accessory — unless indeed the law decreed the temporality to be the principal and not the spirituality, to which it was annexed — such was certainly the law as laid down in his treatise, composed and written towards the end of this reign. And as even, according to the ecclesiastical law, this question depends upon the degree to which the law of the land allows of or recognizes the power of the church, it may be proper here to present the passages in Bracton in which he lays down the principle on which it depends: — *Est etiam jurisdictio quæ pertinet ad forum ecclesiasticum, est etiam alia jurisdictio quæ pertinet ad coronam, in causis et placitis temporalium in foro seculari, et unde videndum cujus iudicium et forum actor adire debet et verum est quod sive laicum sive clericum venit quis convenire, debet adire iudicium et sequi forum rei et iudicem habebit illum apud quem rem habet domicilium, sive domicilium habuerit sub jurisdictione unius vel duorum. Et licet generaliter verum sit quod actor forum rei sequi debeat, fallit tamen in casibus, propter diversitatem jurisdictionum et causarum de rebus spiritualibus et temporalibus et eorum sequela sicut in causa matrimoniali, et rebus præmissis ob causam matrimonii quæ in foro ecclesiastico debent terminari, quia cujus juris jurisdictionis est principale, ejusdem juris erit accessorem. Et eodem modo sicut si in foro seculari agatur de aliquo quod pertinet ad coronam et fides fuerit apposita in contractu non propter hoc pertinebit cognitio super principale ad iudicem ecclesiasticum. Item fallit in causa testamentaria et aliis pluribus causis ecclesiasticis. Item, ratione contractus. Item, ratione rei petitæ sit se clericus petat versus clericum vel laicum debitum, quod non sit de testamento vel de matrimonio, sequi forum laicale”* (*Bracton, De Legibus*, lib. v., c. xi., ss. 1, 2, p. 401). And so there was prohibition if the ecclesiastical court entertained suit of debts not by testament (*Ibid.*, c. iii., s. 2). From this it is clear that the secular courts claimed jurisdiction wherever temporal rights or interests were involved, except where the secular law itself, as in the case of testaments, had given the ecclesiastical courts jurisdiction. Hence the distinc-



ecclesiastical liberty, particularly as such violators and perturbators were subjected to excommunication by the

tion drawn as to contract, although breach of contract might be, as breach of good faith, a spiritual offence. Hence also the distinction as to debts not arising out of testament (as legacies), although non-payment of debts may be a spiritual offence. And it is obvious that if the ecclesiastical courts were allowed to claim cognizance of every matter which involved a spiritual offence, as every matter in the world *might* involve such an offence, they would have jurisdiction over *all* matters, and there would be constant conflicts between the two jurisdictions, the ecclesiastical often deciding on different principles from the secular, because deciding *in foro conscientie*. And it is obvious that it would be no sufficient answer to urge that the ecclesiastical courts could only enforce their sentences by excommunication; for if it had any deterrent effect (as it must be presumed that it would have in a country professing the Roman Catholic religion), to the extent to which it had effect it would obstruct the exercise by the king's courts of their jurisdiction, and tend to erect an ecclesiastical sovereignty in the realm often opposed to the secular sovereignty. How far this is or is not the necessary consequence of the principles of the church could be a theological question; the legal question, it is conceived, and, even upon the view of the church, the practical question, would be how far the state, as the law then stood, recognized, or allowed of the exercise of such a power by the church when not in accordance with the law of the state. Now, to the extent to which the exercise of her purely spiritual power was *not* antagonistic to the secular law, the state considered its exercise spiritual, and allowed of it; but so far as it was antagonistic to secular law, and so directly interfered with temporal matters, which were its province, the state deemed it not purely spiritual, and did not allow of it. Thus Bracton says: "*Quia clericus in nullo conveniendus est coram iudice seculari quod pertinet ad forum ecclesiasticum, sicut in causis spiritualibus vel spiritualitate annexis, ut si pro peccate vel transgressionem fuerit penitentia injungendi, et quo casus iudex, ecclesiasticus habet cognitionem, quia non pertinet ad Regem injungere penitentias, nec ad iudicem secularem, nec etiam ad eos pertinet cognoscere de iis quæ sunt spiritualibus annexa; sicut de decimis et aliis ecclesia provisionibus. Item nec de catullis quæ sunt de testamento vel matrimonio, et quamvis in omnibus aliis actionibus sive placitis ad forum seculare pertinentibus videatur quod clericus sequi debeat forum seculare, et ibi agere respondere ratione rei vel contractus ubi agitur realiter vel personaliter, sicut in actione injuriarum vel criminis dum tamen civiliter agatur, secundum quod videri poterit tota die, quod si clericus quia laicum fœdum non habet, summonitionem suscipere noluerit nec plegios invenere mandabitur episcopo vel ordinario loci quod faciat talem venire coram rege vel iusticiariis suis ad respondendum. Quamvis sunt qui dicant*" (very likely alluding to the claims set up by Archbishop Boniface, as stated in the text), "*quod de nullo placito tenentur respondere, nec ratione rei contractus, vel delicti coram iudice seculari, et salva pace eorum, videtur quod fit in omnibus actionibus et placitis civilibus et criminalibus præterquam in executione iudicii in causa criminali ubi laicus condemnandus esset ad admissionem vitæ vel membrorum, et quo casu quamvis iudex seculari habet cognitionem ut cognoscat de crimine, tamen nec habet potentiam exequendi iudicium, non enim possit degradare clericum, et ideo propter ejus defectum habet ordinarium executionem iudicii,*" which is wrong, seeing that as he goes on to chap. ix., that bishops could not give capital sentences. "*In causa enim sanguinis judicare non potest nec debet*" (c. ix.), and his inference therefrom is that, therefore, they should execute sentences they could not pronounce is inconsistent with what he allows to be recognized as the law of

confirmation solemnly passed of *Magna Charta*:<sup>1</sup> or whether they took cognizance of actions personal con-

the church; and the natural inference from what he states elsewhere in an earlier part of his work, viz., that, as the secular courts could not execute their sentences, they had no jurisdiction; and ultimately the vexed question was settled practically in that way, by the recognition of privilege of clergy, which withdrew the culprit, although after conviction, from the secular jurisdiction. But this was because the law of the state did still recognize the privilege of clergy, for Bracton admits that the secular courts could not execute sentences in such cases. Bracton therefore went wrong in one direction, as Boniface went wrong in the other. The archbishop would not allow secular jurisdiction in any case over clerks. The judge insisted upon it even in cases where the law itself allowed of and recognized an immunity against it. And the only practical test, in the determination of the question in cases where the exercise of the church's power interfered with secular law, is whether the matter was within the scope of secular law, and, if so, whether the state allowed or recognized the claim of the church against it. Now, no one could doubt that matters of debt, of contract, of perjury, or of murder, were properly within the scope of secular law. It allowed the jurisdiction of the church in cases of capital crimes by clerks (for the special reasons mentioned by Bracton), and also in cases of debt arising out of testament, *i. e.*, legacies, but not in other cases. And Bracton goes on to state that prohibition would go to the ecclesiastical judge, even although a papal delegate, if he interfered in other matters, as "*De tanta terra*," or "*de catellis vel debitis quæ non sunt ex testamento vel matrimonio*" (c. iii.). If it was the case of a papal delegate, the form was different, but that was the only difference. "*Si delegati fuerunt à domino papa, vel alio ordinario, tunc sic. Prohibemus vobis ne teneatis placitum in curia Christianitatis auctoritate litterarum domini papæ.*" So there is a chapter as to prohibitions in cases relating to advowsons. "*Prohibitio si rectores ecclesiarum contendant inter se sine patronis*," because the right of the patron, it was supposed, might be prejudiced, though as it would be *res inter alios acta*, it would not be so. "*Prohibitio si clericus præsentatus ab eo quæ optinuerit implacitatus fuerit à clerico ipsius qui amisit in curia regis*," which seems contrary to what was laid down as law by Glanville. So, generally, "*prohibitio contra eum qui sequitur contra iudicium factum in curia regis*" (c. iv.). And then as to presentations and admissions of clerks presented, "*Si minus idoneus fuerit recusatus, et idoneus admissus, ad querelam breve formatum à iusticiario.*" "*Est et aliud genus prohibitionis ubi quis clericus præsentatus ad ecclesiam pro dominum regum propter insufficientiam recusatus fuerit, et alius idoneus institutus, si velit inquietare institutum;*" that is, if when the bishops had rejected a clerk as not a fit and proper person (which was admitted to be of ecclesiastical cognizance), and another had been instituted, he was disturbed by the other. It was decreed that this was of temporal cognizance (although, of course, it was also an ecclesiastical offence), because the clerk then had a freehold vested in him at law, and a temporal right of action, which, however, was a better reason for allowing him to sue at law, than not allowing him to sue in the ecclesiastical court. But it must be observed that this great question of ecclesiastical or lay jurisdiction was regarded by the sovereigns, and disputed by the lawyers, with so keen an interest, not merely from the jealousy which had arisen between the two jurisdictions—espe-

<sup>1</sup> A. D. 1253. When Boniface and the other bishops solemnly in Westminster Hall pronounced excommunication against the infringers of that statute.

cerning contracts, or *quasi-contracts*, trespasses, or *quasi-trespasses*, either between clerks, or between clerks com-

cially on account of the superior learning of the clergy — but on account of its practical bearing upon the vital question of *fees*; which had begun to be regarded with great interest as a source of revenue to the crown, and of profit to the king's judges. And although Bracton was a cleric, he was a king's cleric, for he was a king's judge; so his sympathies would be with the crown and the king's courts on such questions. On the other hand, as he was a cleric as well as a lawyer, it may be presumed that he would be careful how he went beyond the line of sound doctrine, as laid down by the church, though he would probably stretch it to the utmost. And the instance just given is a strong one, for the clerk rejected would have a right of appeal, and the prohibition is directed to the papal delegate, the suit prohibited being a spiritual suit before him, though it appears to be after the canonical institution of the other clerk; and it is to be presumed that there would be no such institution after a caveat or notice of appeal; "*habet ipsum in placitum de eadem ecclesia coram vobis autoritate litterarum domini papæ, et quoniam injustum est quod idem A ipsum B implacitet qui per ipsum archiepiscopum sicut idonea ad eandem ecclesiam admissus et canonice institutus*" (c. iv.). The case, it will be seen, was close to a line of a downright interference with the admitted rights of the ecclesiastical courts to determine questions of canonical fitness of clergymen for benefices. So of the next case of prohibition, where the king had, by reason of the vacancy of a see, presented to a living belonging to it, which involved the royal claims to the custody of vacant benefices. That the distinctions drawn were often of great difficulty and nicety is manifest from some of the cases put by Bracton. Thus as to a suit by a spiritual person for disturbance of a right to *nova garba*, if the possession had been long and peaceable, and the disturbance recent, so that the right really was not in question, the ecclesiastical court had cognizance of, otherwise not so (c. viii.). So in cases between ecclesiastical persons as to payments for services purely spiritual, as if a religious house were bound by deed to pay a certain rent to a clerk as curate or chaplain. The language of the writ allowing the ecclesiastical court to proceed is curious, and contains a clear recognition of canon law, so far as it did not trench upon the jurisdiction of the king's courts in matters temporal, "*quod cum juri canonico sit contrarium, quod si clericus clericum, et maxime viros religiosos convenerit coram iudice ecclesiastico, quod iidem religiosi quasi religionis suæ immemores et de ecclesia (salva pace eorum) male scientes, ut negotii processu impediunt, et iudicium ecclesiasticum subterfugiant,*" etc. But the next chapter declares the law to be that the ecclesiastical courts had no jurisdiction in matters of contract, notwithstanding a supposed breach of faith, nor matters of debts or goods, except arising out of testament: "*Item, jurisdictionem suam non mutat fidei interpositio, nec sacramentum prestitum. Et illud idem dicendum erit de debitis et cattallis quæ non sunt de testamenta*" (c. ix.). On the other hand, it was laid down that there could be no prohibition of things purely spiritual: "*Non habebit prohibitio in curia Christianitatis de aliquo spirituali vel spiritualitate annexo, sive agatur inter clericos sive inter clericum et laicum, vel ubi agatur ex causa testamentaria vel matrimoniale vel de aliquo de quo sit poenitentia injungenda pro peccato*" (c. xl., fol. 40). "*Nec de aliquo tenementi, quod si sacrum et per Pontifices Deo dedicatum. Item quasi sacra, quia spiritualitati annexa, sicut sunt terræ ecclesias tempore dedicationis cum ædificiis in eadem contentis, et in pertinentis eorum. Item non habebit prohibitio si de decimiis agatur. Item si pecunia legitur et petatur ut debitum in foro ecclesiastico ex causa testamentaria. Item ut si clericus clericum spoliaverit de decimiis vel aliis de quibus cognitio pertinet ad forum*

plainants, and laymen defendants; if any archbishop, bishop, or other prelate were called upon by the king's

ecclesiasticum" (c. x.). Next, however, comes a chapter which has an important bearing upon the above-mentioned constitutions of the archbishop as to excommunication. It is headed, "De iudicibus qui fraudulentè simul faciunt suas comminationes ut facilius procedant ad excommunicationem," in order, as the chapter explains, to evade the prohibition. "Sunt iudices qui, cum citatus comparuerit de re ad cognitionem suam non pertinente, ut prohibitionem evadere possent, faciunt ei tres comminationes quam libet post aliam primo die litis, et ubi satisfecerit eorum voluntate, innodant eum vinculo excommunicationis et pendente prohibitionem, cum talis in huiusmodi excommunicatione prestitent pro xl. dies, ut prohibitionis prosecutio ne evadant, ad impetrationem eorundem iudicum significat ordinarius Regi quod talis in excommunicatione exhibet per tantum tempus, et procurat captionem," i. e., the writ "De capiendo excommunicato," for the arrest of an excommunicated person remaining arrested forty days. It is most important to observe and to bear in mind that the secular law did then thus enforce the sentence of excommunication by the temporal punishment of imprisonment, because it has a double bearing upon the question raised by the above-mentioned canons, especially as to excommunication. For, on the one hand, it implied a recognition by the law of the state of the right of the church to enforce her laws by that sentence (so that it did not interfere with the jurisdiction of the king's courts); and, on the other hand, it entitled and indeed necessitated the state to consider what were the cases in which it would allow such interference with the jurisdiction of its own courts; for otherwise there would be two inconsistent and compulsory jurisdictions, each supported by the arm of the temporal power, which would be absurd. Hence in the above chapter, it will be observed, that the right of the ecclesiastical court to pronounce sentence of excommunication even in matters which might be also of secular cognizance is not disputed, so long as it was not directed to thwart and obstruct the jurisdiction of the secular courts. And hence, on the other hand, the canonical law itself admitted that the extent to which it was allowed thus to interfere with the secular jurisdiction as to matters which came within it, must depend upon the secular law. It was one thing to claim, as the church, *jure divino*, to say that such an act was an offence against her laws, and to pronounce a purely spiritual and private sentence or penance as the condition of her spiritual privileges; and quite another thing to claim to pronounce judicial sentences, having the sanction of the state, against the courts of the state. The degree to which the church could use the arm of the state must necessarily depend upon compact with the state. Hence the claim set up by the archbishop for an unfettered use of the judicial sentence of excommunication was a very formidable one in that age, and in such a state of the law, when the sentence had temporal consequences, and might, as the other articles showed, be used against the state itself with the aid of the power of the state. These observations also have another bearing, to show how entirely these questions of the extent of canon law are confined to countries where the Roman church is recognized, and not only recognized, but established by the state. It was this, so to speak, which gave the state its *locus standi* in the matter. For Bracton admits that, as to the mere enjoining of penance by spiritual sentence, the courts of law would not interfere. The judicial sentence of excommunication was quite different, as it involved temporal consequences by the law of the state. If it had not, it is implied that the state would have had no right to interfere. It claimed to interfere because the church was claiming to use the power of the state. And the views of the state as to how far the church should be allowed to do this had mate-

letters to answer before a secular judicature upon any of the before-mentioned points, it was ordained by the au-

rially altered since the Saxon times. It was here our author was in error. He fancied the church had changed; but it was not so; it was the state. It was not that the church had encroached in the reign of Henry II., or receded in the reign of Henry III. It was the state which had altered its policy, in consequence of an alteration in public opinion. The Saxon times no doubt were times of superstition and of ignorance, and the ecclesiastical power had then an ascendancy, which naturally declined, as the preponderance of intellect and education on its side began to lessen. No one who has mastered the spirit of the Saxon laws could conceive it possible that the king's court (if there were one) could order a bishop to be arrested for proceeding in an ecclesiastical cause. The thing would be impossible; for the bishops were recognized as the principal members of the courts, for the purpose of instructing the courts in the laws spiritual and secular, and therefore as to the respective limits and bounds of each. But Bracton goes on to show that if a bishop, or even a papal delegate, proceeded in defiance of a prohibition, he should be arrested or attached. "*De iudiciis attacheandis si procedant contra prohibitionem.*" "*Breve de iudiciis attacheandis si auctoritate litterarum domini papæ,*" etc. (c. xii., fol. 409). Enough has been said to show how serious the question was; one of equal delicacy and difficulty. On the one hand was the state allowing the church to use the arm of secular power to enforce her sentences: and, on the other hand, the church, claiming to use it against the state itself. On the one hand, the church indirectly claiming to arrest—or to have arrested—the officers and ministers of the state; and, on the other hand, the state threatening to arrest the officers and ministers of the church, and even the delegates of the sovereign pontiff himself. It is not likely that the canon law, based, as it was, upon the civil law—which had firmly and clearly settled the principles upon which such questions were to be determined—should have led to, or allowed, such a complete dead-lock of the two powers of church and state. And our author was entirely in error in supposing that it had ever laid down doctrines which could lead to it. It must be evident that in the canons or constitutions set up by the archbishops, were some serious departures from the principles of canonical law, and claims to exclusive jurisdiction, which went beyond what the canon law warranted. It was on that account they were disallowed by the see of Rome, and not from any change in papal policy. It is plain that the archbishop virtually claimed exclusive jurisdiction in every case in which a spiritual offence might enter, for he claimed jurisdiction, and also claimed unfettered power of excommunication, which might be used to enforce the sentences of that jurisdiction, even although opposed to secular law, upon matters admitted to be within secular jurisdiction. To have allowed this would have been to constitute the ecclesiastical tribunals the *sole*, or at all events the *supreme* tribunals of the realm. Yet in nothing is the canon law more clear than in holding the distinction between the two kinds or orders of power, and allowing its due province to each: and the sounder views of the canonists only allowed of a superiority of the spiritual over the temporal in the sense of its indirect spiritual or moral influence by its sentences *in foro conscientie*. To any extent beyond that, *i. e.*, to the extent to which it used the arm of the state, it must depend upon the assent of the state. The canons above mentioned went beyond this limit, and did not have the assent of the state. Therefore they were disallowed. The distinction between the two powers was well understood in that age, and by ecclesiastical authors, some of whom Bracton, as a cleric, had no doubt read. "*Spiritualis siquidam potestas non ideo præsidet, ut*

thority of this clerical council, that they should not appear; for these were all pronounced by the same authority to be spiritual matters; and further, that no power was given to laymen to judge God's anointed (as laymen, instead of an authority to command, were under a necessity to obey the church and churchmen);<sup>1</sup> and they were directed, either to go, or to write to the king, to inform him that they could not, but at the hazard of their order, obey such mandate.

He further ordained, that if the king's prohibition or summons should speak, not of tithes, but of right of advowson; not of breach of faith, or perjury, but of chattels; not of sacrilege or disturbance of ecclesiastical liberties, but of trespass of some of his subjects; then the prelates were to make answer, that they neither had, nor pretended to have cognizance of rights of advowson, nor of chattels, nor of things that belonged to the king's courts; but only of tithes, and other things merely spiritual, appertaining to their office and jurisdiction, and to the safety of souls; and they were to pray him, that he

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terrenæ in suo jure præjudicium faciat, sicut ipsa potestas terrena quod spirituali debetur nunquam sine culpâ usurpat" (*Hugo de St. Victor de Sacramento*, lib. ii., part i., c. vii., p. 608). And again, "Secundum causam justitia determinatur, ut videlicet negotia secularia a potestate terrena spirituali vero et ecclesiastica à spirituali potestate examinentur" (*Ibid.*, c. viii.). It would be difficult to find anything in Bracton opposed to this. There were no doubt theories of divine right, but it will not be found that they were ever adopted by the popes in any other sense than this, that their power of spiritual direction over the members of their own church was of divine right. It was nobler than that of princes in this sense, that it was exercised over the soul, whereas that of princes was exercised over the body. "Principibus datur potestas in terris, sacerdotibus autem potestas tribuitur et in coelis, illis solummodo super corpora, istis etiam super animas, unde quanto dignior est anima corpore, tanti dignior est sacerdotum quam sit regnum." These were the words of Innocent III. (*Responsio Domini Papæ — Bocage Epistol. Innocent III.*, p. 527, 8). What was this but in effect saying that the power of the church, *jure divino*, was entirely over the soul, on which account alone it is nobler than that of princes, which is over the body? But it follows plainly from this that when the church exercised power over bodies, by the aid of the state, it could not be *jure divino*, and must, therefore, depend entirely on compact with the state. That being so, the question would be what was the extent to which the state allowed it. The archbishop's canons went beyond that limit, and therefore were disallowed; and disallowed by a successor of Innocent III. in exact accordance with his own views. This seems to have been the plain truth of the matter.

<sup>1</sup> This is the language of the canon law: *Laicis super ecclesiis et ecclesiasticis personis nulla sit attributa facultas, quos obsequendi manet necessitas, non imperandi auctoritas*. Decret., lib. i., tit. 10.

would not prohibit their proceedings in such cases. To this extent did they state their claim of jurisdiction.

The manner in which the council directs the bishops to act in support of this jurisdiction is very worthy of notice. It directs that the bishop who was immediately affected by the king's interposition, should admonish him to desist. If he did not desist upon this representation, then the archbishop was to wait on the king, or, in his absence, the bishop of London, as dean of the bishops, taking with him two or three more bishops; and if, after this, the mandate was enforced, the sheriffs and officers who made the attachment or distress were to be excommunicated, and their lands laid under an interdict: if clerks and beneficed, they were to be suspended and deprived; if not beneficed, they were not to be admitted to any benefice for five years. Canonical punishments were also inflicted on those who advised, dictated, or penned the writs. If the king did not, upon this, revoke such process, the bishop immediately affected was to put under an interdict all the villis and castles of the king within his diocese; if he still persisted, the other bishops, as in a common cause, were to do the same. If the process was not revoked within twenty days, then the archbishop and bishops were to put their whole dioceses under an interdict.

Such was the process devised by this council of churchmen against the king, if he presumed to encroach on their clerical privileges by the forms of law:<sup>1</sup> but the pope, who saw reasons for changing his policy with respect to the church and churchmen in this country, and began to entertain some jealousy of their independence, readily consented, on the application of the king,<sup>2</sup> to annul the whole of these provincial constitutions.

These canons, however, made a variance between the temporal and ecclesiastical power. In the year 1267, which was the 51st of this king, the archbishop Boniface and the rest of the clergy made a formal complaint to parliament, and exhibited many articles as grievances, called *articuli cleri*. What the contents of these articles were we are ignorant, except so far as can be collected from the mutilated remains of some of the answers given by the parliament. From these, and from the tenor of the be-

<sup>1</sup> *Vid.* Lyndw. Provinc. ad finem. Johnson's Canons. Spelm. Conc.

<sup>2</sup> Hum., vol. ii., 192.

fore-mentioned canons, it may be conjectured what was their principal aim.<sup>1</sup>

Such was the state of the law, whether common or ecclesiastical, at the close of this reign.

There was not in this king, nor in his ministers, any remarkable attention to the cultivation of our laws. They were all too much employed in concerting schemes of defence against the rebellion and intrigues of the potent barons (a). However, notwith-

The king and  
government

(a) It is strange that our author should not have noticed the important advance made in this reign towards a representative constitution. As already mentioned, the Great Charter of John contained this clause: "No scutage or aid shall be raised in our kingdom (except in those specified cases warranted by feudal law), but by the general council of the kingdom. And we shall cause the prelates and greater barons to be separately summoned by our letters; and we shall direct our sheriffs and bailiffs to summon generally all who hold of us in chief." In the charter of Henry III., indeed, this matter was reserved for further consideration, as grave and doubtful; but, as Sir James Mackintosh observes, "the formidable principle had gone forth; and though every species of impost, without the authority of parliament, was not expressly renounced until the *Confirmatio Chartarum*, in the 15th Edward I., still, during the reign of Henry III., immense advances were made towards the establishment of a representative assembly." Representatives were more than once appointed by the barons, even to watch over the administration of justice; and it is observed by the historian just quoted, "that these and other measures of the kind, proposed or adopted in this reign, may be considered some irregular approach to the principles which the constitution afterwards, in its more mature age, applied more effectually to the same purpose" (*Hist. Eng.*, vol. i.). In the Parliament of Oxford, it was ordained that a body of barons should be chosen, part by the council, part by the parliament, to redress grievances and reform the state, subject, however, to a parliament to be assembled thrice in the year, and who were to be informed of breaches of the law and justice throughout the country, by four knights, to be elected for that purpose by each county (*Rymer*, i., 375, 377, 38.) This was the course taken by the barons at the time of the first charter, under John; and they amounted, of course, to a complete revolution, and led to civil war, as before. Yet it is difficult to see what other course could have been taken to ensure an observance of the law and an honest administration of justice. The great difficulty, as Guizot observes, in that age, was as to guarantees or securities. It was indeed recognized and laid down by Bracton in this reign, that the king should govern with the advice of a council, "*Legis habet vigorem, quicquid de consilio et consensu magnatum, et republice commune sponsione auctoritates regis juste fuerit definitum.*" But this implied that authority emanated from the king, though under the advice of his council; and it was far removed from the compulsory imposition of an authority over the king, however necessary it might be, in consequence of the abuses of the age, and the absence of constitutional control. This administration of affairs more or less lasted for some years, during which, however,

<sup>1</sup> 2 Inst., 599.



standing this neglect, and the convulsions attendant on civil broils, the events of this reign had a very great effect in promoting the improvement of our laws.

a more constitutional system, by means of elective representative assemblies, by degrees gained ground. The learned Lingard has collected numerous instances of royal ordinances for the election of knights of the shire to inquire into grievances, or superintend the collection of taxes. This system, indeed, had begun under John. In the most ancient instance of it on record, in the year 1207, the subsidy was collected under the inspection of the itinerant judges; but the method was found accompanied with inconvenience and delay; and, in 1220, we find writs to the sheriff, appointing him the collector, in conjunction with two knights, to be chosen in a full court of the county with the consent of all the suitors (*Brady*, ii., App. 149-196). In like manner, among the demands of the barons under John, one was that two justices should go their circuits four times a year to hold assizes, with four knights of the shire, chosen by the county. Under Magna Charta twelve knights were to be elected in the county court of each county, to inquire into civil customs of sheriffs, etc. In 1223 the king (Henry III.) ordered every sheriff to inquire by twelve knights what were the rights and liberties of his shire; and, in 1254, he ordered that two knights should be chosen by the men of every county to assemble at Westminster, and determine, with the knights of other counties, what aid they should grant. In 1258 the king appointed four knights of each county to inquire into all the excesses and injuries committed by judges, sheriffs, and bailiffs (*Brad.*, ii., App. 196). In 1261 the earl of Leicester summoned an assembly of knights, to be chosen for each county; and though that of course was without lawful authority, still it was another great step in advance towards a constitutional legislative assembly. This was all under the administration of affairs already mentioned, and which continued for several years; but as it was a virtual deposition of the king, it could not be acquiesced in, and his attempts to get rid of it led to civil war. In the result, however, it led, in 1265, to the assembling of the first real parliament of England. "That assembly met," says Sir J. Mackintosh, "according to writs still extant; and the earliest of the kind known to us, directing the sheriff to elect and return two knights for each county, two citizens for each city, and two burgesses for every borough in the county." He observes that in the Great Charter of John the tenants of the crown alone were mentioned as forming the council, along with the barons and prelates; and the principle of *general* representation by election was now first applied. But, as already mentioned, it had been growing up, as regards the counties, for a long course of years. And not less so as regarded the boroughs. "During the lapse of two centuries the cities and boroughs had silently grown out of their original insignificance, and had begun to command attention, from their constant increase in wealth and population. Taking advantage of the poverty of their lords, the inhabitants had purchased for themselves, successively, the most valuable privileges. In lieu of individual services, they now paid a common rent, their guilds were incorporated by charter, and they had acquired the right of choosing their chief magistrates and enacting their own laws. Formerly, when the king obtained an 'aid' from his tenants-in-chief, he imposed a tallage on his boroughs, which was levied at discretion by capitation tax on personal property. They frequently offered, in place of the tallage, a considerable sum, under the name of a gift, which, if accepted, was assessed and paid by their own magistrates. This was in reality taxing themselves; and when the usage had been once introduced, it was more convenient and more consistent

Hitherto our kings had been kept under no rules of government, but had exercised a prerogative above law, except such as the necessity of the time and their own discretion prescribed them. The establishment of the Great Charter, as it defined certain points of supreme authority, and ascertained some valuable privileges of the subject, so far put a restraint upon the royal power. The king had now certain bounds limited to him, which he could not transgress without the invasion being perceived, and the nation taking immediate alarm.

Nor was the disposition which Henry so frequently showed to break through this new restraint without some good effect. It occasioned resistance in the barons, which ended in repeated and more solemn confirmations of this great declaration of the subjects' rights. In the meantime, the jealousies of the people, long engaged on this one object, wrought wonderfully on their minds; the violence with which the observance of this law was demanded, might inspire a habitual regard for laws in general.

The king felt very uneasy under the restrictions imposed by *Magna Charta*: and not forgetting the arbitrary manner in which his predecessors had ordained, suspended, or qualified laws, he used frequent pretences to avoid a compliance with it. In the writs, at one time, directed to the sheriffs to enjoin a universal observance of the Charter, he caused a remarkable clause to be inserted; namely, that those who did not pay the fifteenth granted at the time of the late confirmation, should not, for the future, be entitled to the benefit of the liberties thereby confirmed.

He carried his power of dispensing much further; he is said to be the first of our kings who employed the clause

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with national customs that the new privilege should be exercised by deputies assembled together." Therefore, in the parliament of 1265, the representatives of the cities and boroughs, it will be observed, were summoned to parliament, as well as those of the counties; and although, as this was under the auspices of Leicester, it was abandoned after his fall, the formidable principle (to use the words of Sir J. Mackintosh) had been introduced; and in the next reign it was again asserted and acknowledged, and henceforth there was a representative assembly composed of elective representatives of the counties, the cities, and boroughs of England, summoned to sit in one house of parliament, the peers and prelates sitting in the other. Thus, by slow degrees and gradual progress, arose the parliament of England, the first assemblage of which undoubtedly signalized this reign.

of *non obstante* in his patents and grants. Henry, when remonstrated with upon this innovation, alleged the example of the pope, and claimed an equal right. Thus were the usurpations of the pontiff, against which our kings had heretofore made the most determined stand, become precedents for their own invasions of the national laws.

There are some few instances in which Henry took a personal part, in enforcing the execution of the laws (a).

(a) The *Placitorum Abbreviatio* contains records of the pleadings and proceedings in the courts from the reign of Richard I. to that of Edward II., and they contain a large collection of the *placita* of this reign, all taken from the proceedings in the *Curia Regis*, and most of them suits between party and party, *i. e.*, common pleas. That court, before the Charter, had been the exchequer, as appears from numerous entries; but when the Charter had enacted that common pleas should not follow the person of the king, as that court did, there was another court established, — the Court of Common Pleas, or the “Bench,” as it was called, to distinguish it from the *Curia Regis*, — the court held before the king, which was established as early as the reign of Henry II., as a court of ordinary jurisdiction. So early, however, as the reign of John, it was settled that pleas before the king’s justices of the “bench,” *i. e.*, his superior judges, so called to distinguish them from the justices itinerant, who were his inferior judges, were in law heard before him. In that case between Henry de Rochala and the abbot of Leicester, before the justiciaries of the bench, the abbot pleaded a charter of Richard, that he should not be sued, except before the king or his chief justiciary; but it was held that all pleas held before the justices of the bench were deemed to be in law held before the king himself (*Plac. Abbrev.*, 32; *Hale’s Hist.*, c. i., p. 147). Thus the *curia regis* had become established as a regular judicial tribunal, with ordinary jurisdiction between subject and subject; and from the numerous entries of its proceedings, it appears that it had a regular procedure. In the reign of Henry III. much attention appears to have been given to the manner of pleading; and Bracton not only makes constant reference to the subject, but has a division of his work expressly allotted to it, under the head, “De Exceptionibus.” These often are taken from the Pandects, while the phrase, *Litis contestatio*, or issue, is taken from the Roman law. There are numerous instances of pleading in Bracton. Thus, among the pleas to an assize, “*Liberum tenementum habere non potuit, quia non tenuit tenementum illud nisi ad terminum annorum*” (*Bracton*, f. 268, a). The system of pleading, also, had become fully established, though still in its first and more natural state. This is shown by the *Placitorum Abbreviatio*, which contains extracts from the records from the time of Richard I. to Edward II. In the time of John there are numerous entries of pleading. Thus, in answer to a title founded on a fine, it was pleaded, “*Quod si finis ille factus fuit, per deceptionem et fraudem factus fuit*” (*Plac. Abbrev.*, 38; *Bed. rot.*, 4). So, where a defendant pleaded a deed made by the father of the plaintiff, the plaintiff replied, “*Quod cartam quam profert sub nomine patris sui nec dedit nec concedit, etc., sed qualiter carta illa facta fuit vel a quo, semper postquam facta fuit præsentavit pater ejus personam,*” etc. (*Plac. Abbrev.*, 92; *Kent. rot.*, 22; and see 48 *Linc. rot.*, 7; 39 *North rot.*, 6). So, in an assize of *mort d’ancestor*, the tenant pleaded that the demandant was seized himself *post obitum* of the ancestor, and by fine (of which he produced the

When a jury in Hampshire had acquitted some felons, contrary to plain evidence, and it was afterwards known that they themselves had been in the confederacy with the offenders, he, in a rage, committed them all to prison, and ordered another jury to be impanelled.<sup>1</sup> Henry stood forth himself in parliament as the prosecutor of Henry de Bath, chief justice of England, when some charges of malpractice were exhibited against him.<sup>2</sup>

The administration of justice was sometimes interrupted by the violence of the times. It is related, that in 1224, Fowkes de Breaute, when thirty-five verdicts of disseisin had passed against him, came into court with an armed force, seized the judge, and imprisoned him in Bedford castle. This offender was afterwards banished;<sup>3</sup> but though *his* life was spared, his brothers and other noblemen, to the number of twenty-four, who assisted in this outrage, and stood a siege of the castle against the king's forces, were all hanged (a).

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chirograph) quit-claimed the land. The demandant replied "Quod ipse nunquam fuit seisis de terræ quam petit, nec unquam eam teneat. Et inde ponit se super assisam, etc. Et cum habuarit seisinam talem, etc., bene ostendet quod concordiam illum nec fecit nec facere potuit. Et petit sibi allocari quod chirographum illud non est, factum in forma aliorum chirographorum," etc.; and so argues against its genuineness (*Ibid.*, 88 *Sussex rot.*, 21; and see 48 *Linc. rot.*, 7; 50 *Buck. rot.*, 2; 59 *Linc. rot.*, 5). So, in a case on a grant of land in *maritagium*, "Dicet quod Ranulphus non potuit dare illam terram in maritagio, quia obiit inde seisis; et inde ponet se super juratum" (*Ibid.*, 59 *Linc. rot.*, 79; 79 *War. rot.*, 2). So, in assize of *mort d'ancestor*, the tenant pleaded "Quod terra illa pertinet ad ecclesiam suam, quam habet ex dono regis Ricardi, et ecclesia inde est seisisita." The plaintiff then denied the seisin of the church, "Robertus dicet, quod frater suas inde fuit seisis in dominico suo, die qua rex Ricardus illam ecclesiam dedit prædicto Herberto; ita quod ecclesia illa tunc non fuit seisis nisi de serviciis illius terræ" (*Plac. Abb.*, 44; *Staff. rot.*, temp. Johan.). So, in trespass for fishing in the plaintiff's free fishery, "liberia piscaria," the defendants pleaded that they fished there as in a fishery where their ancestors and themselves had fished as of their common of fishery, "Et non a propria piscaria et libera, ipsius Nicholai" (*Ibid.*, 134 *Berk. rot.*, 163, temp. Henry III.) These cases often afford curious and interesting illustrations of the usages and institutions of the age.

(a) Without any legal trial, which, of course, was contrary to the *letter* of Magna Charta (just before then confirmed for the third time), but not to its *spirit*, for when it provides that a man shall not be condemned except in course of regular course of law, *per legem terræ*, that of course implies that the regular course of law will suffice to meet the case; therefore it does not apply where the regular course of law is paralyzed — as in the case referred to — by a rebellion, against which the ordinary course of law is powerless.

<sup>1</sup> M. Paris, 509. Hume, vol. ii., 228.

<sup>2</sup> Parl. Hist., vol. i., 51.

<sup>3</sup> M. Paris, 221-224. Wilk. Sax. Leg., 382.

The sources of information begin at this period to be more authentic. We have, in this reign, some statutes enacted by the legislature, besides the Statutes. Charter of Liberties and the Charter of the Forest. These statutes are either to be found on the rolls in the Tower, or in some memorials, which have delivered them down to us as acts of parliament, and therefore we are not at liberty to dispute the genuineness of them (a). Many parliaments were holden in this long reign, and it is thence inferred, that many acts must of course have passed, which have not reached our times; though it is remarkable, that Bracton, except in four or five instances,<sup>1</sup> quotes no statutes but those which are now extant. So

Hence, although the incident is narrated in all the contemporary chronicles, and occurred immediately after the confirmation of the Great Charter, it does not appear either then or at any subsequent time to have been considered illegal, and it is the earliest known instance in our annals of the exercise of martial law,—i. e., *lex martialis*,—or the law of war. It is very remarkable that Hale states that in this reign they had a particular commission and judicatory for matters happening in time of war, and cited *Placita de Tempore Turbationis*, wherein are many excellent things (*Hist. Com. Law*, c. vii.). This must have been the exercise of martial law by means of court-martial; it is impossible to conceive what else it could have been. Hale does not cite any authority for the statement, but no doubt he had some foundation for it. No doubt an execution in time of peace, except in due course of law, would be illegal, and Hale cites such a case, in which it is assigned as the ground of reversal that the judgment was in time of peace. This implies that in time of war prisoners taken might be tried by court-martial, though they were subjects, and that is indeed expressed by Hale in another part of the same chapter, where he says that the marshal has a judicial power over prisoners taken in war, and that martial law extends to the members of the army, or those of the opposite army; and in his *Pleas of the Crown* he lays down the law as to levying war against the crown, and shows that rebellion is war, and that it may be levied without the “pomp” of war, and even without military weapons, numbers making up for arms—so that multitudes armed with clubs or sticks may constitute an army in rebellion. From these premises, it plainly follows that if the rebellion is too formidable to be repressed by the ordinary course of law, it may be met by martial law, and prisoners executed by court-martial, as in the above case.

(a) “The statutes, which are extant, but not of record, are such as, though they have no record extant of them, yet they are preserved in ancient books and muniments, and in all times have had the reputation and authority of acts of parliament; for an act of parliament made within time of memory loses not its being because not extant of record, especially if it be a general act; for of general acts the courts are to take notice, and they are not to be tried by the record. Though the record itself be not extant, yet general statutes made within time of memory—viz., since Richard I.—do not lose their strength if any authentic memorials thereof are in books, and seconded with a generally received tradition attesting and approving the same” (*Hale's Hist. Com. Law*, c. i.).

<sup>1</sup> *Vide ante.*

destructive has the hand of time been, that only two of those few we have are to be found upon record.

The only statutes of this reign to be found on the statute-roll, are *Magna Charta* and *Charta de Foresta*. The rest are not on record, but only preserved in books and memorials. Such are the statutes of Merton and Marlbridge (a). This destruction of ancient documents has given occasion to the following position, that notwithstanding the record itself be not extant, yet general statutes made within time of memory, that is, since the first of Richard I., do not lose the force of *statutes*, if any authentic memorials of their being such are to be found in books, seconded with a general received tradition attesting and approving the same.<sup>1</sup> In conformity, perhaps, with this favorable presumption, it has become a rule, that courts are to take notice of general acts of parliament, without pleading them; for such statutes are never to be put on the issue of *nul tiel record*, but are to be tried by the court; and, if there be any difficulty or uncertainty,

(a) Lord Hale observes that "many records of acts of parliament have in long process of time been lost, and possibly the things themselves forgotten at this day, which yet, in or near the times wherein they were made, might cause many authoritative alterations in some things touching the proceedings in law, the original cause of which changes are at this day hidden and unknown to us; and indeed histories give us an account of the suffrages of many parliaments whereof we at this day have none or few memorials extant. The instance of the great parliament at Oxford about the 40th Henry III. may, among many others of like nature, be a concurrent evidence of this, for, though we have mention made in our histories of many constitutions made in that parliament, we have no monuments of record concerning that parliament, or what those constitutions were (*Hist. Com. Law*, c. i.). One of these constitutions seems to have given rise to an important alteration in the appointment of the sheriffs, and thus appears to afford an illustration of Hale's remarks. We read that it was ordained that a high sheriff should be appointed annually for each county by the votes of the freeholders (*Ann. Burt.*, 416; *Rymer*, 667). And we find that next year, although the sheriffs were appointed by the crown, the freeholders in each county were ordered to choose four persons, and present them to the barons of the exchequer, who should select one for the next sheriff (*Ib. Rymer*, 381; *Annal. Burton*, 428-433). And although the system of popular election was not afterwards established, yet there is no doubt that the above constitution laid the basis of a system under which a list of names, known to be approved of by the counties, is submitted every year to the council in the exchequer, and from which the sheriffs for the ensuing year are chosen. Hale says, "There are also some few laws or constitutions relative to the law, which, though possibly not acts of parliament, yet have obtained in use as such; as, *De Distinctione Scaccarii*; *Statutum Paris et Cunsie*; *Dies Communes in Banco*; *Statutum in Hibernia*; *Statutum de Scaccario*; *Judicium Collistrigii*, and others."

<sup>1</sup> Hale's Hist., 16. Vide vol. i., 477.

the judges are to make use of ancient copies, transcripts, books, pleadings, or any other memorials to inform themselves.

The statutes of this reign which are now in being are to be found in the common editions of the statutes. The statutes from *Magna Charta* down to the end of Edward II., including also some which, because their period is not ascertained, are termed *incerti temporis*, are sometimes called *vetera statuta*; those from the beginning of the reign of Edward III. being contradistinguished by the appellation of the *nova statuta*.

Among the remains of legislation during this reign are to be reckoned the *legatine* and *provincial constitutions*, which contributed to lay a foundation for a national canon law. It is to the collections of antiquaries and canonists, and not to any authentic depository, that we must resort for a sight of these productions of our clerical legislature. They are to be found in Spelman's Councils, and at the end of Lyndwode's *Provinciale*; not to mention that they are likewise arranged and commented amongst others in that very work.<sup>1</sup>

There are also some records of pleadings and proceedings during this reign. Besides these, there are some very few notes of adjudged cases to be found in Fitzherbert's Abridgment. These are mentioned not so much for their importance, as on account of their great antiquity, being the first of that kind of memorials which, in after times, became so numerous, and furnished the best materials for explaining the grounds, reason, and progress of our laws.

The great ornament of this reign is the treatise of Henry Bracton, *De Legibus et Consuetudinibus Angliæ*,  
Bracton.  
 which has been so often quoted. Bracton's book, compared with that of Glanville's, is a voluminous work. The latter is little more than a sketch, as far as the plan of it goes, and that is confined to proceedings in the king's court; but the former is a finished and systematic performance, giving a complete view of the law, in all its titles, as it stood at the time it was written. It is divided into five books, and these into tracts and chapters.<sup>2</sup>

<sup>1</sup> See also Johnson's Canons.

<sup>2</sup> Because the form in which this work is printed does not much contribute towards exhibiting to a cursory inspector the plan and design of the whole, it may be convenient to give a prospectus of the work, as shortly and clearly

If this law treatise had been printed with such divisions and notification of its contents as are given in the note

as possible. This I shall do by referring to the pages, as a more ready clue than the tracts and chapters.

Of the first book, the first four folios relate to the law in general, and should more properly be entitled, *de legibus et consuetudinibus Angliæ*. From fol. 4 b. to fol. 7 might be entitled, *de personarum divisione*; and from fol. 7 b. down to the end of the first book, fol. 8, *de rerum divisione*. From thence to fol. 98 may go under the general title, *de acquirendo rerum dominio*, as in the printed copy; with, however, the following subdivisions: — From fol. 11 to 60, *de donatione*, with its appendages and consequences, as livery of seisin, and the like; then, gaining title by prescription, fol. 52; of incorporeal things, fol. 52 b.; of liberties and franchises, 55 b.; of confirmations, 58; in fol. 60, *de testamentis*; and fol. 62 b., *de successione*, with its consequences, as supposititious children, 69; of partition, 71 b.; of homage, 77 b.; relief, 84; custody of heirs, 86; marriage, 88 b.; dower, 92, with which the second book, *de acquirendo rerum dominio*, concludes.

The third book, from fol. 98 b. to fol. 104, may be entitled, as it is in the printed copy, *de actionibus*; from 104 b. to 112 is upon courts and different appointments of justices; then, again, from 112 to 115, upon actions; from thence to fol. 159, the end of this book, is properly entitled *de coronâ*. But the several subdivisions thereof should be as follows: — Fol. 115 b., of the iter of the justices and *capitula coronæ*; fol. 118, of lèse-majesty; 120 b., of homicide; 122, of the office of coroner; 125, suit and outlawry; 131, revising outlawry; 134 b., murder; 135 b., abjuration; 138, proceeding on appeal of homicide; 141 b., of the duel; 143, of indictments; 144, of appeals *de pace et plagis*; 144 b., *de plagis et mahemio*; 145, *de pace et imprisonment*; 146, of robbery; 147, rape; 150, *felo de se*; 150 b., of theft; 152, of provors; 155 b., of distress and replevin, which concludes the third book.

Having thus finished his discourse upon criminal suits, he begins the fourth book, which is to treat of civil actions. This goes from fol. 159 b., to 337 b., and may be divided into four lesser parts. Thus, from fol. 159 b., as far as fol. 220 b., may be entitled, *de possessione propriâ liberi tenementi*, as it contains an account of those actions for the recovery of freeholds that were grounded upon a man's own seisin or possession. This is the first principal division; the second is, from thence to fol. 251 b., *de possessione pertinentiarum ad liberum tenementum*, that is, of actions for recovery of things appertaining to a freehold, upon the claimant's own possession of the thing; then the third division, from fol. 252 to 317 b., *de possessione aliend*, being an account of such actions as were grounded on the seisin of another; next follows the fourth, from fol. 317 b. to 327 b., *de ingressu*, being a writ founded sometimes upon a *possessio propria*, sometimes upon a *possessio aliend*. These are the four principal divisions of the third book, the first three of which divisions may be thus subdivided: — Fol. 160, of intrusion; from 161 to 220, of novel disseisin; 219, of a writ of entry upon a disseisin; 220, of *quare ejecit infra terminum*. The second contains, from fol. 220 b., of rights and easements; 222, of assize of common of pasture; 229, of admeasurement of common; 229 b., of the writ *de quo jure*; 231, common of estovers; 232 b., of nuisances; 235 b., writs of entry upon a disseisin of common and nuisance; 236 b. to 237 b., of redisseisins and execution; from fol. 237 b. to 246 b., *de assisâ ultimæ præsentationis*; 246 b., *quare impedit* and *quare non permittit*; 248, writs *ad admittendum clericum*; 251, *quare non admisit*. Here ends the second principal division. The third, beginning at fol. 252, contains from thence to 280 b., *de assisâ mortis antecessoris*; then, 281, *de consanguinitate*; 284 *de quiddam permittit* for common of the seisin of another; 284 b., *de quo warranto*; next



below, the arrangement of the whole would have struck the eye as distinctly as it does the understanding upon perusal, it being, in truth, a comprehensive and particular account of the law, digested with a strict adherence to method and system. Consistently with the extensiveness and regularity of the plan, the several parts of it are filled with a copious and accurate detail of legal learning. The rules of property are explained; the proceedings in actions, through the minutest steps, are investigated and developed; while every proposition is supported by fair deduction, or corroborated by the authority of some adjudged case; so that the reader never fails of deriving instruction or amusement from the study of this scientific treatise on our ancient laws and customs.

If the matter of this book is more instructive and entertaining than Glanville, the access to it is rendered more easy by the style in which it is written. This is infinitely superior to Glanville, and much beyond the generality of writers of that age, being, though not always polished, yet sufficiently clear, expressive, and nervous. The excellence of Bracton's style must be attributed to his acquaintance with the writings of the Roman lawyers and canonists, from whom likewise he adopted greater helps than the language in which they wrote. Many of those pithy sentences which have been handed down from him, as rules and maxims of our law, are to be found in the volumes of the imperial and pontifical jurisprudence. The terms and phraseology of those two laws are borrowed by him to express the meaning of our municipal customs; and many points of law and practice are adopted from thence. The familiarity with which Bracton recurs to the Roman code has struck

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follows fol. 235, the *assied utrum*; 288 b. to 296, *de convictione*; from 296 to 312 b., the writ of dower, *unde nihil*; 313, *de recto de dote*; 314, *de amensuratione dotis*; 315, of waste; which concludes the third principal division; then follows the fourth division, from 317 b. to 327 b., to the end of the fourth book, *de ingressu*.

The fifth book may be entitled, from fol. 334 b. to 438 b., either *de proprietate et jure* (in contradistinction to the former book), or *de actione reali*; from 439 to 443 b., *de actione personali*; 443 to the end of the book, *de actione mixta*. That part, *de actione reali*, may be subdivided thus:—From fol. 327 to 332 b., is upon the writ of right; from 333 to 336 b. is of summons; from 336 b. to 364, of essoins; from 364 b. to 372 b., of defaults; 372 b., of the *intentio*; 376, of demanding a view; from 380 to 399 b., of vouching to warranty; from 399 b. to 438, is of exceptions; after which follows, as before stated, that *de actione personali*, and *de actione mixta*.

many readers more forcibly than any other part of his character; and some have thence pronounced a hasty judgment upon his fidelity as a writer of English law.<sup>1</sup> But the passages to which such persons take exception, if put together, would perhaps not fill three whole pages of his book; and it may be doubted whether they are such as can always mislead the reader. Upon a second consideration of those places where the Roman law is stated with most confidence, it will seem to be rather alluded to for illustration and ornament than adduced as an authority; though it is visible that Bracton, with all his endeavors to give form and beauty to our own law, by setting forth its native strength to advantage, did not refuse such helps as could be derived from other sources to improve and augment it.

The value set on this work, soon after its publication, is evinced by the treatises of *Fleta* and *Britton*. These two books, the best productions of the reign of Edward I., who was an active encourager of such undertakings for improvement of the law, are nothing more than appendages to Bracton (*a*). The latter was intended as an

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(*a*) This is an entire error, as will be manifest to the mind of any one who has read both works, which are as different as possible. The suggestion of Selden that the work called by the name of Britton is an abridgment of Bracton, has been supposed to imply that both names were names of the same person, which is not likely, as the books are so different in substance and in style (as well as in language—Bracton being in Latin, and Britton in Norman-French); and it is not possible, for Bracton died before the end of the reign of Henry III., and does not mention the later statutes of his reign, and Britton goes down to the 13th Edward I. The book of Britton, therefore, belongs to *that* reign, and will be there treated of; and, as our author has analyzed Bracton, it may be convenient there to analyze Britton.

<sup>1</sup> It seems to be a fashion to discredit Bracton, on a supposition of his having mingled too much of the civilian and canonist with the common lawyer. Any notion that has got into vogue on such a subject is likely to have many to retail it, and few to examine its justness. Among others who have most decidedly declared against Bracton I find *Mons. Houlard*, the Norman advocate. This gentleman has been at the pains to give an edition of Glanville, Fleta, and Britton, but has omitted Bracton, because his writings had *corrupted* the law of England.

That gentleman's conceptions about the *purity* of the law of England have seduced him into a very singular theory. He lays it down that Littleton's Tenures exhibit the system introduced by William the Conqueror in all its genuine purity; that this system was corrupted by a mixture from other politics in the writings of Britton, Fleta, and Glanville, but more particularly in those of Bracton. Full of this preposterous idea, he has published an edition of Littleton, with a commentary; and, to decide the point without more debate, has entitled it *Anciennes Loix des Francois*. After this, the admirers of Bracton will not apprehend much from this determined enemy to his reputation as an English lawyer.

epitome of that author, and the merit of the former is confined to the single office of supplying some few articles that had been touched lightly by him, with the addition of the statutes made since he wrote. In after times he continued the great treasure of our ancient jurisprudence, where the rudiments of the law were to be traced in their first formation—where were to be seen the origin and sense of certain notions and principles, the reason of many rules of property and of practice, which had become obscure by the change of times, with the causes that led to the framing of many ancient statutes, which would be unintelligible without the help of this author. Thus was Bracton deservedly looked up to as the first source of legal knowledge, even so low down as the days of Lord Coke, who seems to have made this author his guide in all his inquiries into the foundation of our law.

The author of this work is usually styled *Henry de Bracton*, though he has passed, as fancy or mistake may have dictated, by the names of *Brycton*, *Britton*, *Briton*, *Breton*.<sup>1</sup> He is said to have lived at the latter end of the reign of Henry III. There is an internal evidence that the book was written before the fifty-second year of this king; for it takes no notice of the writ of entry in the *post*, nor of the regulations about distresses, attachments, guardians in socage, and other points, made by the statute of Marlbridge; and as he quotes a case in the forty-sixth year of this king,<sup>2</sup> it must follow that the book was written, or at least received the author's last hand, some time between that and the fifty-second year. It is probable that in matters of fact the writer relied on his own experience, or the information of those he personally knew, for he quotes no decision of a court, or opinion of a lawyer, but of this king's reign, though one of them is so early as the third year. It is said that Bracton was a judge.

The clergy continued to practice in the secular courts, in the same manner as before. We find among the provincial and legatine constitutions of this reign several injunctions to restrain them: *Nec advocati sint clerici vel sacerdotes, in foro seculari, nisi vel proprias causas vel miserabilium prosequantur*.<sup>3</sup> But these, like

Miscellaneous  
facts.

<sup>1</sup> Dis. ad. Flet., sec. 2.

<sup>2</sup> Bract., 159.

<sup>3</sup> Spelm. Conc. anno. 1217.

those which forbid them accepting other secular employments, were not observed. It appears all through this reign that many dignitaries of the church were justices in the courts at Westminster, and in the eyre,<sup>1</sup> as bishops, abbots, deans, canons, archdeacons, and the like. Notwithstanding the clergy were chosen to these stations for their learning, Bracton, speaking of some judges of his time, calls them *insipientes, et minus doctos, qui cathedram, judicandi ascendunt antequam leges didicerint*.<sup>2</sup>

In former times there had been no particular domicile, or house, for the resort and education of practisers of the law. But it has generally been believed that very soon after the bench was fixed at Westminster, the practisers and officers of that court, as well as students of the law, began to settle in some place in London, most convenient for their studies, conference, and practice.

The title of *capitales justitarius*, and of *justitarius Angliæ*, ceased in 52 Henry III., when the title first commenced of *capitalis justitarius ad placita coram rege tenenda*.<sup>3</sup>

The salary of the justices of the bench, in the twenty-third year of this king, was £20 per annum; in the forty-third year, £40. In the twenty-seventh year the chief baron had 40 marks; the other barons 20 marks; and in the forty-ninth year, £40 per annum. The justices *coram rege* had, in 43 Henry III., £40 per annum. The chief of the bench had, in the forty-third year of this king, 100 marks per annum, and the next year another chief of the same court had £100. But the chief of the court *coram rege* had only 100 marks per annum.<sup>4</sup>(a).

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(a) It seems to be suggested here that Bracton spoke of the clerical judges, which is scarcely likely, seeing that he was one of them himself, for that he was of the clerical profession is clear, as he is called "*dilectus clericus noster*" by the king, in a grant to him, dated 1254 (*Dugdale's Orig. Jurid.*, 56). And when the whole passage is quoted, it will be seen that Bracton was not speaking of the king's judges, but of those in local courts. Having described the law as consisting in part of unwritten laws or customs, he says: "*Sunt autem consuetudines placis et diversæ, secundum diversitatem locorum; sicut in diversis comitatibus civitatibus, etc., ubi semper inquirendum erit quæ sit illius loci consuetudo et qualiter ut autem consuetudinæ qui consuetudines allegant. Cum autem hujus modi leges et consuetudines per insipientes et minus doctor, etc., sequis trahuntur ad abusum: et quistant in dubiis et in opinionibus multotiens pervertuntur à majoribus qui potius proprio, arbitrio quam legem autoritate causas decedunt.*" So that what he was aiming at was the mischief done by multifarious decisions of local courts, founded upon supposed local customs, rather than upon legal principle, the very evil reprobated by Lord Hale as existing in the county courts.

<sup>1</sup> *Dug. Or. Jur.*, 21.    <sup>2</sup> *Bract.*, 1.    <sup>3</sup> *Dug. Or. Jur.*, 38.    <sup>4</sup> *Ibid.*, 104.

## CHAPTER IX.

### EDWARD I.

STATUTUM WALLIE—ORDINATIO PRO STATU HIBERNIE—CONFIRMATIONS OF THE CHARTERS—DE TALLAGIO NON CONCEDENDO—ORDINATIO FORESTÆ—OF WRECK—WARDS—OF AIDS—DISTRESSES—ASSIZES—OF ATTAINTS—VOUCHING TO WARRANTY—ATTACHMENT—OF RAPE—EXTORTION OF OFFICERS—SPREADERS OF FALSE REPORTS—OF REPLEVYING PRISONERS—OF CLERGY—PEINE FORTE ET DURE—THE OFFICE OF CORONERS—WARRANTY OF TENANT PER LEGEM ANGLIÆ—WASTE—FEIGNED RECOVERIES—HOMICIDE SE DEFENDO—STATUTE OF MORTMAIN—STATUTE OF ACTON BURNELL.

WE now enter upon a period when the law made a very great and sudden advancement. It is generally agreed that this is, in no small degree, to be ascribed to the wisdom and activity of the prince on the throne, who, through his whole reign, and indeed within the first thirteen years of it, labored more than any of his predecessors to improve our judicial polity in all its parts. So successful were his endeavors, and so permanent have been their effects, that Edward I. has obtained with posterity the distinguished title of the English Justinian.

Sir Matthew Hale is very full and significant in the eulogium he bestows on this monarch. "It appears," says he, "that the very scheme, mould, and model of the common law, especially in relation to the administration of the common justice between party and party, as it was highly rectified, and set in a much better light and order by this king than his predecessors left it to him; so in a very great measure it was continued the same in all succeeding ages to this day; so that the mark or epocha we are to take for the true stating of the law of England, *What it is*, is to be considered, stated, and estimated, from what it was when this king left it" (a)<sup>1</sup> The justness of this representation will be seen in the sequel.

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(a) Our author considered the reign of Edward I. as marking a great era or epoch in the history of our law; and there can be no doubt that, in the

<sup>1</sup> Hale's *Hist. Com. Law*, 163.

The reader who has gone through the last reign is sufficiently apprised of the then state of the law to compre-

hension of all our legal authorities, it does so. And it may be convenient here to present something like a general view of the policy and legal history of the reign. In order to understand the subject, it is necessary to bear in mind the state of things at the accession of this king.

During the long and turbulent reign of Henry III., there had been a long struggle between the rising spirit of liberty and regal tyranny; and as law had not yet attained supremacy, and there was therefore no guarantee of its observance but civil war, the country for nearly half a century had suffered all the misery of constant intestine strife, in which the struggle between the spirit of liberty and of tyranny necessarily assumed the aspect of a contest between the principles of anarchy and authority. During this period, on the one hand, the nation had become so wearied of the strife, and so sensible of the necessity for the supremacy of law in order for the security of liberty, that it was prepared to acquiesce in any fair exercise of royal authority necessary to the attainment of that end, and even any exercise of it short of actual tyranny; and, on the other hand, the royal resources were so crippled, that it was not prepared for any extension of that authority beyond what would be sanctioned by law. In a word, the crown and the people were alike weary of contest, and *the treasury was empty*. Hence a mutual sense of the necessity of peace, and a desire on the part of the crown to replenish the treasury as much as possible by means not contrary to law; and a disposition, on the part of the people, to submit to any exactions which could be reconciled with law and any fair degree of liberty. The king, in short, was prepared to administer justice between his subjects if they would pay for it; and they were quite willing to pay a reasonable price for the blessings of peace and order. Hence the whole policy of the internal legislation of the reign may be summed up thus: the making law and justice profitable to the crown, and thus deriving a revenue, with advantage to the subject, from the administration of justice and the supremacy of law.

It also was a necessary consequence of the principle that the crown is charged with the duty of seeing that justice is administered, and that thus allegiance and protection are correlative. Where there is the duty and responsibility, there must be the power. And, again, as the crown alone can enforce the execution of the sentences of courts, of necessity their power or jurisdiction must be derived therefrom. And, again, as jurisdiction, civil or criminal, is coercive, it is a necessary attribute of the executive power of government, as Guizot points out. Thus Rayneval lays it down that "*le pouvoir judiciaire est une émanation du pouvoir exécutif*." (*Droits de la Nature*, ch. xii.) Thus, our most ancient authorities of law lay it down that all jurisdiction is from the crown. Thus Fleta: "*Sine warranto jurisdictionem non habent neque coercionem*" (c. xxxiv.). So, in the *Mirror of Justice*, it is said that jurisdiction is the power to *declare* the law, and that it rests with the king, because he alone can enforce and execute it (c. i.). The county courts were in theory the courts of the king, but *only* in theory: in reality, they were mere popular assemblies. *Practically*, a king's judge made a king's court; and the object was to establish the supremacy of the king's courts on the basis of the supremacy of the royal authority. This was done indirectly by getting parliaments to grant subsidies, in consideration of the remedy of abuses (which belongs more to political than legal history), and, in a more direct manner, by improving and extending the administration of justice in the king's courts, and thus bringing litigation thereto, and then deriving, by means of fees, or fines, or forfeitures, a revenue therefrom.

hend the effect of the numerous alterations which it will receive in this. These alterations were principally made

Such was the policy of the reign, and with this latter part of it legal history has to deal. The acquisition of a revenue from the administration of justice, was not indeed entirely a novelty, or a discovery of this particular king. The discovery had been made and acted upon by one of our worst sovereigns, John, who, however, had acted upon it according to his nature, in a crude and arbitrary way, by the infliction of fines or exaction of bribes; and hence the clause in the Great Charter against selling justice. Edward I., however, was a far more wise and astute prince, and, having been disciplined in adversity, and instructed by experience and observation, pursued a far more wise and politic course. This policy was to improve the administration of justice between his subjects, by means of a more regular procedure, and to make them pay for it in a regular and proper manner. Hence so much of the legislation of his reign relates to procedure. This was a policy naturally appreciated by lawyers. From the age immediately following that of Edward I., his reign has always been spoken of as that of a singularly wise and sagacious prince, and as the era of very useful and valuable legislation, especially as to the administration of justice. Thus, in the *Year-Books* of his grandson Edward III., an eminent judge, Sir William Herle, Lord Chief-Justice of the Common Pleas, described him from the bench as the wisest king that ever had reigned: "Fuit le plus sage roy que unques fuit" (*Year-Book*, 5 Edward III., 14). And the very terms of the preamble of the first great statute of his reign, the first great statute of Westminster (anno 3 Edward I.), marks a great era in the history of law: "Ceux sont les establishments le roi Eduard faits a Westminster a son primer parlement-general apres son coronement; per son counsell et per l'assentments des archieuesques, evesques, abbes, priors, countes, barons, et tout le commonalty de la terre, ellonques summones. Pur ceo que nostre seignior le roy ad graund volunt et desire del estate de son realme redresser en les choses ou mestier est d'amendement; et ceo pur le common profit de saint eglise et de son realme; et pur ceo que l'estate de son realme et de saint eglise ad este malement garde; et les prelates et religious de la terre en mults des manners griesves; et le people autrement treit que estre duist; et la peace meines garde et les leyes meins uses, et les misfesants meins punies, que estre duissent; que quoy les gents de la terre doubteront meins a misfaire; ey ad le roy ordeine et establee les choses souscripts; les queux il entende destre profitables et covenables a tout le realme." There is no reason to doubt that this really expressed the views with which this wise and sagacious sovereign ascended the throne and assumed the government of the realm; and that, after the experience of half a century of turbulence and discord, in which civil war had been the only remedy against tyranny, he and his councillors were really impressed with the necessity of establishing the supremacy of law, and for that purpose of asserting the supremacy of the royal power, and basing upon it the supreme and sovereign jurisdiction of the king's courts. And to that end certainly the legislation of the reign was constantly and consistently directed. But it is not less manifest that this wise policy of the king was dictated by an enlightened sense of self-interest rather than by any regard for justice in the abstract, or for the rights or interests of his subjects. For there never was a sovereign more rapacious or unscrupulous, nor one who, while zealous for justice as between his subjects, was more utterly regardless of it as between his subjects and himself. Thus, although there was much of wise and salutary legislation to restrain oppression among his subjects, he himself never meant to be restrained by them, and, no doubt, knew right well that his crown lawyers had established a maxim, that the

by parliamentary interposition. The statutes of this reign present a new scene to the reader, very different from that

crown was not bound by a statute unless by express terms mentioned—so that the excellent provisions he enacted for the protection of his subjects from each other, lent them no protection against the crown. Thus, for instance, as to one of the most important provisions of the second statute of Westminster, protecting infants, *femes coverte*, and others from oppression, it was held that the king was not bound by it, so that he might oppress them at pleasure without redress (35 *Hen. VI.*, 62). So, although the legislation of this reign did much to improve the remedies of subjects as between themselves—by action or suit at law—it must be borne in mind that this remedy did not avail as against the king's officers, acting in their official capacity on behalf of the crown. The only remedy allowed in such cases was the petition of right, *i. e.*, a petition to the crown against its own officers—a remedy in that age, it need hardly be said, entirely illusory, so that practically any amount of oppression was practised by the king's officers without any real redress. So as to another enactment in the statute of Westminster (c. xvi.), as to taking of beasts, it is remarkable that though the statute does not in terms except the king or his ministers, yet it was held that, by construction of law, they were excepted, because the king might do it by his prerogative (13 *Edw. IV.*, 2 *Inst.*, 191). As in cases of purveyance, as it was called, which led to the most grievous abuses, many of the enactments in the statute of Westminster will be found to have had a direct bearing upon the benefit to be derived to the royal revenue from the administration of justice in the king's courts; as, for example, stat. West. 1., c. 35, which, as Coke says, was pointed to a mischief (in local courts), to the prejudice of the king, in losing his fines in actions, and amerciaments and other profits (2 *Inst.*, 229), and the terms of the statute itself are "*en prejudice du roy: et a damage du people*;" but the former being evidently the real grievance. So as to the pretended limitation set up for the first time in this reign, to the jurisdiction of the county courts, restraining it to cases under 40s., unless the king's writ was obtained (see the comments on the statute of Gloucester), the object of which was to bring business into the king's courts, where the fines, fees, and amerciaments would augment the royal revenue. No doubt the suitors also gained the advantage of better judicature and regular procedure in the supreme courts, but the interest of the subject was not the object, the real object was the necessity for money. The same object was the cause of other obnoxious proceedings of the reign; for example, the oppressive proceeding by *quo warranto*, of which Coke says, "The truth is, that the king wanting money, there were some who persuaded him that none that had franchises by the grants of the king's predecessors had right to them, for that they had no charters to show for the same, for that in truth most of their charters, either by length of time or by casualty, were lost or consumed; whereupon it was openly proclaimed, that every man that held those liberties or other possessions, by grants from any of the king's progenitors, should, before certain selected persons, show, *quo jure illi retinent*, etc., whereupon many that had long continued in quiet possession were taken into the king's hands. To remedy which, there was a chapter in the statute of Gloucester, passed in the sixth year of the reign" (2 *Inst.*, 280). In this and the next reign, writs of *quo warranto* appear to have been very frequent. In *quo warranto*, the party claimed to have a franchise (of toll) in his manor, and said that his father died seized, and this seems to have been held sufficient (*Bro. Abr.*, *Quo Warranto*, fol. 3). In *quo warranto*, the party claimed to hold a court for his tenants in his manor; and it was held sufficient to show that he had the manor (*Ibid.*, fol. 4; 17 *Edw. II.*). So numerous were



which he has passed in the preceding. We come now to a series of legislative acts, which, in all periods of the

the claims to franchise, as appendant (*Ibid.*, fol. 5; 6 *Edw. II.*, fol. 6). Free warren was a franchise sometimes claimed (*Ibid.*, fol. 6; 6 *Edw. II.*, 6, 7). So as to fairs, markets, or tolls (*Year-Book*, 16 *Edw. IV.*, 10; 15 *Edw. IV.*, 4, 7). Franchises could sometimes be claimed by prescription, that is, by user from before the time of legal memory (*Ibid.*, fol. 8; 6 *Edw. II.*, fol. 7). Whenever the subject claimed any power of privilege, whether of holding local courts or markets, or levying tolls, or the like, if he could not support his claim at law, he was liable to be heavily fined for usurping the franchise, and also had to forfeit it to the king; who could then sell it to him or to the highest bidder. Thus the proceedings had a direct effect in augmenting the revenue. This politic prince, in order to give his exactions the color of legality, and to promote the object he had in view, of enabling himself to derive as large a revenue as possible in accordance with law, and especially from the administration of justice, caused a treatise to be written, and to give it greater weight and authority, to be written in his own name, whereby the law, to the utmost possible extent, should appear to favor the royal prerogative; and, in particular, to base the administration of justice upon the supremacy of the royal authority. As the learned treatise of Bracton was already in existence and quite sufficiently favored the prerogative of the crown, it is obvious that no new treatise could be really required for the exposition of the law; and, indeed, the new treatise by Britton is, for the most part, based upon that of Bracton; so that it has been supposed to be only a new and popular version of it — Bracton being in Latin, and Britton in the Norman-French of that age. But it differs from that of Bracton in this most important respect, that it is far more favorable to the prerogative, and especially with reference to all possible pecuniary emoluments or exactions to be derived from the subject under the forms of justice or the pretence of law. That it should be so will appear natural enough, when it is borne in mind that it was in effect written under the king's dictation. This appears upon the face of the book, for it begins thus: "Edward, par la grace de Dieu, Roy D'Engleterre et Seignieur de Irlande, a tous ses feals et ses sujets, pees and grace et Sauwaycon. Desiraunt estre le peuple que est en nostre protection, par la suffraunces de Dieu (la quele pees ne peut mye bien estre sans ley), avons les leyes que l'en ad use en nostre royaume avant ses heures fait mettre en escript solonques ceo que ca est ordeine, et volons que soient issent uses et tenues in tous points, save a nous de repealer et de amender, a tous les foits que nous verrons que bon a nous serra par l'assent de nos countes fist un liver deux ans prochein apres le fesance de cet statute, en quel est reherse tout ces statute," which is indeed recited in Britton, fol. 169. Thus, then, it is clear that the book was written at the direction of the king, and within the first five years of his reign, after the first statute of Westminster, and before the second. It also appears, from the preamble of the book itself, that it was written at the dictation of the king, and with an evident desire to favor the royal prerogative and the jurisdiction of the royal courts et barons, etc. The language of this preamble plainly indicates that the treatise was written under the dictation of the king, and also with the object of effecting some alterations, the nature of which will be apparent from a perusal of it, and a comparison with the tenor of the prior work of Bracton. As to the first point, it was certainly the traditional belief of the age; for in the reign of Henry VI., a chief justice, Prisot, distinctly stated from the bench that the book of Britton was written under the orders of Edward I.; and he fixes the date of its composition. For, speaking of the first statute of Westminster (3 *Edw. I.*), he said: "C'est statute fuit fait al

law, have been considered as constituting a necessary, yet difficult, branch of study. These furnish an immediate

temps de Roy Edw. I., le quel Roy fuit appurpose d'aver mis tout en certaine, et en esscriture, et commenca de ceo faire livers de et plus sages hommes del ley, s. judges, et auxi il fist en liver deux ans," etc. (*Year-Book*, 35 *Henry VI.*, fol. 42). It is quite plain that it had a very different object from that suggested, of putting the law into writing, for that had, as to the common law, already been done in the great treatise of Bracton. As regards any alterations considered necessary by the legislature, it was being done by the statutes passed from time to time. The object was to warp and wrest the common law as much as possible in favor of the royal prerogative, and at all events to represent the whole administration of justice as depending on the royal authority, so as to enhance the necessity for its supremacy. Hence, at the outset, in the very first paragraph, all justice is described as resting on the royal authority. "En primes, en droit de nous mesmes, et de nostre court, avous issint ordeine, que pur ces que nous ne suffisons mye en nostre propre persone a oyer et terminer toutes quereles de people, avous party nostre charge en plusurs partres sicome icy est ordeine, nous volons que nostre jurisdiction soit sur toutes jurisdictions en nostre royalme, eyent poer, a rendre, et faire rendre les judgments par la ou nous savons le droite verite come juge." Thus, the supremacy of royal jurisdiction is asserted at the outset in all its plenitude, and that strikes the key-note, so to speak, not only of the treatise of Britton, but of the whole policy of the reign, as to law and justice. Thus the whole system of the administration of justice was deduced from this great fundamental principle. "Et volons que justices errants soient assignes oyer et terminer enchescon counte, etc. En droit des justices que sont assignes de nous suyvre, et tener nostre lieu volons que eux eyent conisaunce de amender faux judgments, et de terminer appels, et trespas faits enconter nostre fees et nostre jurisdiction." That is, the King's Bench — "Et enchescon counte soit un visconte," (the sheriff,) "que soit entendaunt au commandements de nous, et de nos justices, que des pleas pledes devant eux par nos brefs eyent record." And so of the coroners — "Et enchescon comiti soient corones eslus a la garde de pleas de nostre pees." So much for pleas of the crown; and it is to be observed that the court of king's bench was alone indicated as the highest court of such jurisdiction, and as following the king; whereas, according to Magna Charta, the court of common pleas was fixed, and is so described in the next paragraph, but is with equal care described as deriving its jurisdiction, in each case, only from a special royal authority, conveyed in a writ. "Volons que justices demoergent continuelment a Westminster, ou aillours la ou nous voudrons ordeiner a pleder communes pleas solonque ceo que nous les maundrons par vous brefs, issint que des paroles deduces devant eux par nous brefs eyent record." Thus it was established that no one could commence an action without an original writ (as it was called), which, in any case not entirely novel, was utterly useless and unnecessary, and was only required for the sake of imposing a fee, and thus deriving a revenue out of the administration of justice. Next the court of exchequer is mentioned: "Ainsi volons nos que a nous Eschekers a Westminster et aillours eyent nos tresorers et nos barons illeques jurisdiction de choses que touchent leur office a oyer et determiner toutes les causes que touchent nos dettes, et ainsi a nos fees et les incidents choses et que el eyent poer a conutre de dettes que l'on doit a nos dettours, par ou nous puissions plus tost approcher a nostre." It was under this specious pretext that the exchequer claimed jurisdiction in matters of private debts, if owing to any person indebted to the king, and from the *Mirror* it appears that there were reasons, as may

occasion to apply great part of the detail of ancient law that has just been delivered; and as the design and effect

well be imagined, seeing how this court was then composed, for objecting to any extension of its jurisdiction (c. v. s. 1, *Abuses of the Law*). Finally, the opening chapter of Britton closes with an emphatic reservation of supreme and paramount jurisdiction to the king: "Et defendons generalement a tous que nul ne eyt poer de amender nul faux judgement de nous justices, *saue les justices que suiuent nous et nostre court*; que a ceo sont par nous entitles, en nous mesmes en nostre conseil. Car ces *reservons nous especialment a nostre jurisdiction*" (Britton, fol. 3). The effect of which in that age was very much to give the king a power practically to determine what the law should be. And it will be manifest that, with servile judges, what the law should be would depend much less on the mere terms of statutes than upon their decisions in interpreting them, especially as the statutes in those days were couched in very general language; while as to the common law it would be perfectly in their power to pronounce it to be what they or the king pleased (especially as there were no legal reports until after this reign), at all events if they were provided with any colorable pretence of authority for so holding. And such authority would be afforded by the very treatise which the astute mind of this wily and sagacious prince had projected and dictated. And it admits of positive proof that, by means of and under cover of this treatise of Britton, the law as laid down by Bracton, and declared or recognized by Parliament, was actually warped and wrested into something entirely different, and indeed opposite, in order to favor the prerogative and increase the revenue of the king. A remarkable instance can be afforded, upon the authority even of as zealous a crown lawyer as Lord Coke, with reference to the privilege of clergy. What the law really was had been lately laid down by Bracton, viz., that a cleric accused of crime could be claimed by the ordinary, and was to be at once delivered to him: "Cum vero clericus captus fuerit, pro alio crimine ex imprisonmentus est, et de eo petatur curia Christianitatis ab ordinario loci. . . . imprisonmentus ille statim ei deliberetur *sine aliqua inquisitione facienda*" (Bracton, lib. iii., fol. 123). Then the statute of Westminster I recited and recognized the privilege, which enacted that the ordinary should not liberate the accused clerk until he had been put to his canonical purgation. "Que ceux que sont endites, etc., en nul maner ne les deliverent sans due purgation, issint que le Roy vient mestier de mitter auter remedy" (*Statute Westminster 1*, c. 2), upon which it was actually held by the king's judges that they had power to try the clerk before he was delivered to the ordinary, contrary to the plain meaning of the act, which implies that he should be put to canonical purgation in lieu of trial at common law. And Britton thus lays down the law: "Si clerk encoupe (*i. e.*, indite) de felony allege clergie, et est tiel trove (*i. e.*, que est un clerk) et l'ordinary demaund donque serra enquis coment il est mesrue (*i. e.*, culpable), et sil soit nient mesrue, donques il serra aroge tous quits: et sil sort mesrue, *si soient ses chateaux taxes et ses terres prises en nostre maine*; et sons corps deliver al ordinary" (Britton, c. iv., fol. 11). That is to say that his goods and chattels should be forfeited and his land seized by the crown, which betrays the reason for this wresting of the law. It is remarkable that it appears, prior to the reign of Edward I., the subject had a remedy as of right against the king for any wrong or injury by his officers or ministers, but that he ordained that no subject should sue the king, but that he should sue a petition to him, which was deemed a matter rather of grace and favor than of strict legal right, *ex debito iustitiæ* (Bro. Abr., *Prerogative le Roy*, fol. 2), (*Year-Book*, 24 Edw. III., 55). In this reign at all events it was held and firmly established that petition of right was the only

of them will be more easily and more naturally comprehended after this preparation, it is trusted the reader will

remedy against the crown for torts done by the king's officers (case of the Prior of Christchurch, 31 *Edw. I.*, 1 *Rot. Parl.* 59, *Rigby Plac. Parl.* 218, 8 *Edw. II.*, 1 *Rot. Parl.* 319), as to wrongful seizure of goods as distress (John Mowbray's case, 33 *Edw. I.*, 1 *Rot. Parl.* 163, *Rigby* 218), as for wool wrongfully taken to the king's use (Michael de Harlar's case, 33 *Edw. I.*, 1 *Rot. Parl.* 163, *Rigby* 268). So for wheat seized under pretence of a Royal Commission (14 *Edw. II.*, 1 *Rot. Parl.* 320), as for trespass to land (18 *Edw. II.*, 1 *Rot. Parl.* 416; Robert of Clifton's case, 22 *Edw. III.*, 5, fol. 12). Sometimes permission to sue the king's servants for torts done by them would be granted, and it should seem that it was held that without such permission they could not be sued, and that it would not be granted if the king had had the benefit of these torts (De Grey's case, 15 *Edw. II.*, 1 *Rot. Parl.*, 391). It will be observed that some of these cases occurred in the reign of this king's son and successor, who only kept up, however, the system his father established. It is manifest that Edward I. only meant, as far as he possibly could, to deprive the subject of remedy. That the opinion of the people was much less favorable to the legislation of this reign than that of the *lawyers*, there is abundant evidence in the *Mirror of Justice*, which bears internal evidence of having been composed or completed about the middle of this reign, since it notices the principal statutes up to the 16 Edward I., and there stops. In the last chapter "Of Abusions of the Common Law," it is said, "the first and chief abusion is that the king is above the law, whereas he ought to be subject to it, as it is contained in his oath. It is an abuse that whereas parliaments ought to be twice in the year at London, they are but very seldom, and at the pleasure of the king, for subsidies and collections of treasure. And where the ordinances ought to be made by the assent of the king and of his earls, they are now made by the king and his clerks, and others who dare not contradict him, but desire to please him and to counsel him for his profit, though the counsel be not amenable for the common people without calling the counties thereto." So that this gives a very different picture of the legislation of the reign from that presented by the courtly hand of the king's "clerks" who penned the statutes, and the servile lawyers who wrote treatises to extol his laws. The *Mirror* goes on to denounce the abuses in the administration of justice. "It is an abuse that justice is delayed in the king's courts more than elsewhere. It is an abuse that a man who hath done manslaughter of necessity, or not feloniously, is detained in prison until he hath purchased the king's charter of pardon. It is an abuse to hold the goods of fugitives forfeited before they be attainted of the felony by outlawry or otherwise." Here it appears that there were two heads of royal emolument, which were constantly kept in view — fines and forfeitures; and it will be difficult to find any part of the law or the legislation of the reign which had not some bearing, direct or indirect, upon the enriching of the exchequer. It appears that amercements were grossly abused, notwithstanding the language of the Great Charter. "It is an abuse to assess an amercement without the afferment of freemen sworn to it, or in the absence of those who are to be amerced." The whole tenor of this chapter in the *Mirror* is to show that the impression was that the administration of justice was used, and often abused, for the sake of securing profit and emolument to the crown. The same impression pervades other sections of the chapter, making severe animadversions upon the two principal statutes of the reign — the first and second statutes of Westminster. "Many chapters," says the commentator, "are reprobable in the statute of Westminster I. The chapter of clerks found guilty of felony is reprobable, for they are not to be delivered to the ordi-

feel himself amply rewarded for the trouble and time which he has already bestowed on the history of the law.

naries, but at the pleasure of the king and his justices. The punishment of officers, disseizors by color of their office, is reprobable for the smallness of it." So of several chapters in the second statute of Westminster, it is said that they are idle, because not kept or observed. The whole course of justice in this reign was settled in the king's courts, so that the king derived a profit from every step in the suit from first to last, and for every default of either party from the commencement to final judgment. A suit could not be commenced even in the county courts (above a small amount), without a writ of justices, for which a fee would be paid. Nor could a suit be commenced in the king's court without an "original writ," even although it was a common action, fully established by usage, and for this writ a fee was to be paid; so to enforce appearance there were distresses or attachments of goods, the proceeds of which went not to the suitor but the crown. And so at every stage amercements were levied to the profit of the crown on every default, and on judgment either for plaintiff or defendant—from the defendant for the wrong he had done, or from the plaintiff for his false suit. Thus it was to the end of the suit, on every default of suitors or jurors, and at every step there was some fine, fee, or amercement to the king. These pecuniary impositions on the suitors in the king's courts were regarded with great aversion, and are mentioned with much bitterness in the *Mirror*. It is an abuse that remedial writs are saleable, and that the king commands the sheriff that he take sureties to his use for the writ. It is an abuse to distrain in personal actions where the profit of the issues come to the king; and no profit accrue to the plaintiff (c. v., s. 1, art. 68-70). And above all, the practice of imposing arbitrary amercements was complained of: "It is an abuse to assess an amercement without the afferment of freemen sworn, or to affer amercements in the absence of those who are amerced" (*Ibid.*, art. 33, 34). It is obvious that the administration of justice had become a source of emolument to the crown, and that this emolument was naturally regarded by the crown as one of its chief objects, and thus justice was made a source of profit to the king, and it became his interest to take care of it, and develop and improve its administration. That this and every other possible source of emolument was diligently made available to the advantage of the royal revenues, the entries with *Memoranda in Scaccario*, temp. Edw. I. (appended to the Year-Book of Edward II.) abundantly attest. It appears from thence that there were very few of the affairs or transactions of life at that time which were not, in one way or another, improved to the advantage of the royal revenue, and especially the administration of justice. Undoubtedly, however, there was a vast deal of valuable and useful legislation in this reign, especially with respect to legal procedure and remedies at law; and, although all dictated by an enlightened sense of self-interest, they were not the less valuable on that account. Hence all our lawyers have always spoken in high terms of the advance made by our law at this era, and Lord Coke is quite enthusiastic about it. He says, breaking out upon the initial words of the first great statute of Westminster, "Ceux sont les establishments:" "And justly may not only these chapters challenge that name, but all other the statutes made in the reign of this king, because they are more constant, standing, and durable than any laws which have been made since" (2 *Inst.*, 156). It would be as idle to ascribe the improvements in our law to the king's regard for justice, as to attribute the rise of representative institutions in this reign to his love of liberty. The improvements in our political system, as all historians testify, arose simply from the royal necessities and the king's want of money. And the improvements in our legal and judicial

We shall explain these statutes as nearly in the order in which they were passed as the nature of the subject will admit.

systems arose from the same cause. Sir Matthew Hale gives a sketch or summary of the legislation in this reign, (concluding with the passage above cited by our author,) which may usefully be here inserted, as it affords at the outset an admirable and comprehensive view of the whole: "He settled the greater charter and *Charta de Foresta*, not only by a practice consonant to them in the distribution of law and right, but also by that solemn act, 25 *Edw. I.*, styled *Confirmationes Chartarum*." As to which, however, it is to be observed, that the very fact that a confirmation was required, and that it was not conceded until the twenty-fifth year of the reign, tells a very different story, and it is notorious that it was then extorted from the king by absolute necessity, and the imminent dread of a rebellion (*Brady*, iii., app. 34; *West.* 431). "He established and distributed the several jurisdictions of courts within their proper bounds;" as to which, however, the plain truth is (as will be seen from Britton) rather the reverse; that he encroached upon, and actually destroyed, the jurisdiction of the ancient county courts, in order to bring all but trivial business into the king's courts, with a view to the profits. At the same time, this no doubt would tend to improve the law and advance justice, and would be for the benefit of the people, although for the profit of the crown, and with the same view the judicature of the superior courts was improved. "He established the limits of the court of common pleas, perfectly performing the direction of *Magna Charta*, *quod communi a placita non sequantur curia nostra*, in relation to the king's bench, and in express terms extending it to the exchequer by the statute of *articuli super chartas*, c. 4." The first part of this is not quite correct, as appears by Britton and the next paragraph in Hale's own account; for it appears that the jurisdiction of the court of the king was still ambulatory, and obtained to the extent of twelve miles round the king's residence. "He established the extent of the jurisdiction of the steward and marshal," (*i. e.* of the king's court,) vide *articula super chartas*, c. 3; and he also settled the bounds of inferior courts, of counties, hundreds, and courts barons, which he kept within their proper and narrow bounds, for the reasons given before; and so gradually the common justice of the kingdom came to be administered by men knowing in the laws and conversant in the great courts, and before justices itinerant." "He did not only explain, but excellently enforced *Magna Charta*, by the statute, *De tallagio non concedendo*, 34 *Edw. I.*;" as to which, however, it will occur to any one, that the fact that it was only conceded at the close of the reign shows at once how much it had been required, and how reluctantly it was conceded. It is notorious that it was extorted only by political and pecuniary necessity. "He settled the forms and solemnities, and efficacy of fines;" the fees on which were a great source of revenue. "He settled that great and orderly method for the safety and preservation of the peace of the kingdom, and suppressing of robberies, by the statute of Winton or Winchester. He settled the method of tenures, to prevent multiplicity of tenures, which grew to a great inconvenience, and remedied it by the statute, *Quia emptores terrarum*, 8 *Edw. I.*, as to which the object was to prevent subinfeudations, whereby the great lords, and especially the crown, lost the profits incident to the oppressive feudal system. He settled a speedier way for recovery of debts, not only for merchants and tradesmen, by the statutes of *Acton Burnel* and *De Mercatoribus*, but also for all other persons, by granting an exemption for a moiety of the lands by *elegit*;" as to which, under his predecessor Henry III., improvements in procedure similar in object had been made, and with the same purpose, to draw business into the king's courts by im-

The statutes of this reign may be divided into such as relate to the rights of things, the administration of jus-

proving the remedies of the suitors in those courts. "He made that great alteration in estates by the statute Westminster 2, whereby estates of fee-simple, conditional at common law, were turned into estates tail, not removable from the issue by the ordinary methods of alienation; the object of which was like that of the statute *Quia emptores*, to consolidate and preserve the great estates, so as to enhance the feudal profits of the crown. He introduced quite a new method both in the laws of Wales and in the method of their dispensation, by the statute of Rutland;" with a similar object of extending the jurisdiction of his courts there, and making the subjection of the principality a source of lawful profit. Further, says Hale, "Partly by the learning and experience of his judges, and partly by his own wise interpolation, he silently and without noise abrogated many ill and inconvenient usages both in his courts of justice and in the country. But this course of improvement had been going on silently and surely ever since the Conquest. Trial by jury was introduced as a substitute for the duel in the reign of Henry II., and the ordeal died out in the reign of John. It is only by losing sight of this constant gradual progression that the erroneous idea becomes rooted in the mind of any very sudden or rapid change at any particular era. "He rectified and set in order the method of collecting his revenue in the exchequer, and removed obsolete and illeivable parts thereof." No doubt, to this part of the system of government, the attention, not only of Edward I., but of every sovereign who had any wise regard for the interest of the crown, was carefully afforded. "And by the statutes of Westminster 1 and Westminster 2, and Gloucester 1 and Westminster 3, and of *Articuli super chartas*, he removed almost all that was either grievous or unpractical out of the law and the course of its administration, by such apt and effective remedies and provisions as have stood ever since without any great alteration." But this was only in completing or carrying out changes which had been in course of progress for two centuries, and which were by no means completed even in his time. Trial by jury, for instance, was not yet developed, and was only to be developed by the same course of gradual progress in which it had arisen. And it will be found that the law and the administration of justice owed infinitely more to the quiet, silent development and improvement they received in the courts of law than to any acts of legislation, which, to say the utmost, only removed obstructions out of the way, or afforded facilities for improvements already attempted. The great alteration was in the establishment of a regular and settled judicature, which had been growing up ever since the Conquest, which no doubt was promoted in the present reign, because it was perceived by the monarch that the administration of justice might be made a source of revenue, and that the more it was improved the greater would be the amount of business done, and that there could be no effectual improvements without a settled judicature and a regular procedure. Finally, Lord Hale says: "That the laws did never in any one age receive so great and sudden an advancement — nay, I think I may safely say all the ages since his time have not done so much in reference to the orderly settling and establishing of the distributive justice of the kingdom, as he did within the short compass of the thirty-five years of his reign, especially about the first thirteen years thereof. As touching the common administration of justice between party and party, and accommodating the rules and methods and order of proceeding, he did the most at least of any king since William I., and left the same as a fixed and stable rule and order of proceeding very little differing from that which we now hold and practice, especially as to the substance and principal contexture thereof" (*Hist. Common Law*, c. vii.).

tice in general, and such as were of a political nature, and concerned objects of very high national importance. We shall speak of these latter first; and shall then be at liberty to consider the others more at leisure.

Of those which are of a political kind, the *Statutum Wallie*, 12 Edward I., presents itself first; being a sort of constitution for that principality, which was thereby, in a great measure, put on the foot of England with respect to its laws and the administration of justice. Of a similar nature, though confined to a few articles of reform, is the *ordinatio pro statu Hibernie*, 17 Edward I., which gives some directions for better ordering the administration of justice in that country. These two statutes, particularly the former, are monuments of this king's wisdom in planning schemes of juridical improvement for every part of his dominions.

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But both Hale and our author had here somewhat lost sight of the course of gradual progression which had been going on ever since the Conquest, the results of which the present reign realized, and which would amply account for a more rapid development of our legal institutions in this reign. Thus Hale mentions, that in the parliament 18 Edward I., in a petition in the House of Lords touching land, between Hugh Lowther and Adam Edgenthorp, the defendant objected that the plaintiff, if he had any right, had his remedy at common law by action, and therefore demanded judgment that he ought not to answer for his freehold there, and the judgment of the lords in parliament was entered to that effect, viz., "Et quia actio de prædicto tenemento petendo et etiam suum recuperare si quid habere debeat vel posset eidem Adœ per assisam competeire, debet, nec est juri consonum, vel hacenus in curia ista usitatus, quod aliquis sine *lege communi* et brevi de cancellaria de libero tenemento suo respondeat et maxime in casu ubi breve de cancellaria locum habere potest, dictum est præfato Adœ quod sibi perquirat per breve de cancellaria ei sibi videret expedire"—that is, that he should sue at law. So (*Rot. Parl.*, 13 *Rich. II.*, No. 10) Adam Chaucer preferred his petition to the king and lords in parliament against Sir R. Knolles, to be relieved touching a mortgage which he supposed was satisfied, and to have restitution of his lands, on which a similar judgment was given: "Et apres les raisons et les allegeances de l'un party and de l'autre sembles a seigneurs de parlement, que le dit petition ne estoit petition du parlement deins que le matteer en ciel conprize dovît estre discuss per le commun ley. Et par ces agreed fuit que le dit Adam ne priendroit riens ensque il sueroit per le commun ley"—that is, that he should sue at law. "And," says Hale, "let any man look over the rolls of parliament, and the petitions in parliament of the times of Edward I. to Henry VI., he will find hundreds of answers of petitions in parliament concerning matters determinable at common law endorsed with answers to this or the like effect: 'Suez vous a le commun ley, sequatur ad communem legem, perquirat breve en cancellaria, si sibi videret expedire, ne est petition due parlement, mandetur ista petitio en cancellorium vel justiciariis de Banco, vel thesaurio et baronibus de Scaccario,' etc. And these, he adds, were *de jure*. So parliament refused to review judgments regularly given in courts of law, except in the regular course by writ of error.



Such of the Britons as had fled from the Saxon invasion into Wales, preserved there, together with their language, and the blood-royal of their kings, their ancient laws and government. (a) The descendants of Cadwalla-

(a) Of which some illustrations have already been given in the Introduction, as bearing upon the question of the prevalence of Roman laws in this country during the centuries of Roman occupation, and their influence in the formation of our own. These laws were collected by Howell Dha; and as the Britons in Wales were those who had resisted the Saxons to the utmost, and were in hostility to them, these laws must represent their own, and not Saxon laws; added to which, as may be seen from a comparison with the Saxon laws of the same period, the latter were in the last degree rude and barbarous, as compared with the British. On the other hand, as the British were barbarians when the Romans arrived, and had no laws at all, and as these laws correspond remarkably with the Roman laws which for centuries were established here, the inference appears not only natural, but unavoidable, that these laws of the Romanized Britons were of Roman origin. Hence the interest of the question what the laws of the Welsh were at this period, because, as Hale observes, although he thinks that we have few evidences touching the British laws before their expulsion hence into Wales, yet the usage in Wales seems sufficient evidence of what was ancient British law (*Hist. Com. Law*, c. xi.), which must be taken to mean Roman-British law, since, as already observed, before the Roman Conquest the British were mere barbarians, and had no laws at all. And although Hale and our author, because they could not, so to speak, trace the descent of the Roman law from the Romanized Britons through the Saxon period to the present, ignored and disregarded the question of the influence of that law upon the formation of our own, yet when by a more close attention to the course of legal history the traces of that descent are restored, the question becomes one of considerable interest, for so soon as the historic connection between the Roman law and ours is disclosed, we see in the Roman law the parent of our own, and this at once gives new interest and importance to the study of *that* law, and throws a great deal of light upon the study and the history of ours. Now, on the one hand, it has already been seen that the laws of the Welsh Britons were of Roman origin. And of course, what these laws were when they were forced into Wales, it is only natural to infer the laws of the Britons had been before, or at the time when the Roman occupation ceased, that is, the military occupation of the country by the Romans; for it would be a great mistake (and perhaps this is the greatest of the many mistakes made upon the subject) to suppose that the Roman occupation ever was entirely terminated. For it is not to be supposed that the myriads of Roman colonists and settlers who, during four or five centuries, had established themselves here, and who from the end of the first century had been in a course of amalgamation by marriages and otherwise with the native inhabitants, departed when the Roman legions were withdrawn. They were for the most part, at that time, *born inhabitants of the country*, with all their ties of interest and relationship rooted there. Britain was to them and unto their families home, and Rome was a distant and a foreign land. The Britons had been Romanized (as we read in the pages of Tacitus) as early as the time of Agricola, and the process of Romanizing had been going on for centuries. On the other hand, the descendants of the Roman colonists were Britons, though Roman-Britons, and natives and inhabitants of the country, and those two classes—the Britons who had become Romans, and the Romans who had become Britons—must have formed the great bulk of the civilized inhabitants at the time the

der are said to have governed in that country during all the Saxon times. When William the Conqueror estab-

Roman empire there had ended. And as during all that period Roman laws and institutions had prevailed, they must have been firmly established. Then when the Saxons came, for the very reason that they were barbarians, they could neither create nor destroy institutions or laws, and it is an entire confusion of ideas to suppose that they ever did so. Barbarians can burn buildings indeed, but they very soon find that it is better to preserve them; and this is more rapidly learned in the case of an invasion intended to be a permanent conquest and settlement, for even barbarians soon cease to destroy what is to be their own. Similar reasons would speedily apply as regarded the inhabitants, for it would be idle to destroy men who could be made useful and profitable by being made tributary, and accordingly we find from the chronicles that so soon as resistance ceased in any part of the country, the Britons were made tributaries, and the whole system of life went on as before. Moreover, as Guizot points out, there was never any sudden, sweeping conquests by the Saxons. There were a succession of invasions and contests, which were local, partial, and successive, and lasted for several centuries, and during the whole of which time, by intermarriages, alliances, and otherwise, there was a consequent course of amalgamation between the two races, insomuch that even in the earliest of the Saxon laws we see them treated on a footing of equality. That being so, the natural theory would be that the Saxons, as they appropriated the property of the Britons, should adopt their institutions. And accordingly we find from their history and from their laws that they did so. As to the manorial institutions, this is shown affirmatively from the recognition of them in the laws. As to the municipal institutions, it is shown at first negatively in the absence of any trace of their destruction, and then affirmatively by the strongest recognition of them. All this has been shown in the review of the Saxon period in the first volume. The notion, then, that the Saxons abolished or abrogated the Romanized laws and institutions of the country is an entire fallacy. They simply adopted them, and preserved them, endeavoring, no doubt, to engraft on them their own barbarous usages, which, however, were rejected by the nobler stock, and dropped off one by one in course of time, so that in the present reign little of them remained, and even the ordeal had gone. In the meantime, as has been shown in the first volume, there had been, even before the Conquest, and still more so since the Conquest, a gradual course of recurrence to the Roman system of laws and institutions, especially as to the administration of justice, modified no doubt by the Saxon usages and animated by the Saxon spirit; and this process had been aided by large recourse to the same great fountain of the civil law, from which our earliest civilized institutions were originally derived. Thus it happened that by this process of restoration, the laws and legal institutions of this country had become substantially wrought into the same state in which they were in Wales among the remnants of the old Romanized race of Britons. For it is to be observed that in the above statute, the object of which was to assimilate the Welsh laws and institutions to the English, there appears to have been very little to alter; a most remarkable fact. Thus, for instance, in the law of real property there were only one or two points in which the Welsh law varied from the English, and only one in which they were altered. And on one of the points on which they differed, viz., in their land being partible among the heirs male, the law of this country had been so until quite recently, and hence it was agreed not to alter it; and the only point on which it was altered was that bastards inherited, by which probably was meant that the effect of marriage was deemed to legitimate previous issue of the parties, which also was the law in

lished himself in England, three princes, descended from that ancient British king, reigned over Wales, then divided into three sovereignties; and kept possession of their respective dominions in defiance of the Conqueror and his successors. The way in which our kings carried on war with this people, was to make a grant to certain great lords of such countries in Wales *as they could win from the Welshmen*. Many great lordships were by this policy conquered; and the lords held them to them and their heirs of the kings of England, as lands purchased by conquest. Such was the origin of *Lords Marchers*, who assumed every authority and prerogative that was necessary for the due execution of the laws within their respective lordships. These new establishments had a tendency to introduce the English law; which was either mixed with the Welsh, or prevailed in certain places, and with respect to certain persons, in its pure state. In some lordships, in consequence of the singular mixture and mutual toleration of laws last mentioned, the English and Welsh resorted to separate and distinct courts of judicature.

The lords marchers increased in number, till Llewelyn ap Gryffydd, the last prince of Wales, was slain in the eleventh year of this king. Upon this event Edward took the principality into his hands, and gave it to his son, afterwards Edward II. Since that time no more lordships marchers were erected; the Welsh, in general, submitting themselves to the kings of England. Edward

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this country in ancient times, and altered in accordance with a later usage in the previous reign. The *Statutum Walliæ*, 12 Edw. I., runs thus: "Aliter usitatem est in Walliæ quam in Anglia quoad successionem hæreditatis: eo quod hæreditas partibilis est inter hæredes masculos: et a tempore cujus non extiterit memoria partibilis extitit. Dominus Rex non vult quod consuetudo illa abrogatur, sed quod hæreditates remaneant partibiles inter consimiles hæredes sicut esse consueverunt: et fiat partitio illius sicut fieri consuevit. Hoc excepto quod bastardi non habeant de cetero hæreditates: et etiam quod non habeant purpartes cum legitimis nec sine legitimis." So that there was little difference as to real property. Then as to remedies, especially for real property, it appears from the laws of Howell Dha that the Britons in Wales had a regular system of procedure in real actions, substantially the same as existed in this country at the era we are now considering; after all the learned labors of Glanville and of Bracton. And when it is borne in mind that their works were largely founded on the civil law, and that there was only an amalgamation of it with the Saxon element in our institutions, as in the trial by jury, the inference is obvious that the civilized institutions of Saxons, of Normans, and of Britons had all been derived from the Roman law, and were really of Roman origin.

soon held a parliament at Ruthlan Castle, and there brought forward the following statute, for appointing a juridical establishment in Wales similar to that in England.<sup>1</sup>

The *Statutum Walliæ* begins the arrangements it is about to make, by stating what was conceived to be the political condition of that country at that time. It says, that Wales with its inhabitants had hitherto been subject to the king *jure feudali*; but that now, by the divine providence, it had fallen in *proprietas dominium*, and was annexed and united to the crown of England as a part of the same body. The king, therefore, wishing that the people inhabiting *Snaudon, et alios terras nostras in partibus illis* (for to such it was confined, and did not extend to all Wales, as it is now called), who had submitted themselves to the king *de alto et basso*, should be governed by certain laws as the rest of his dominions, had caused the laws and customs of that country to be rehearsed before himself and his nobles. Some of these, by the advice and counsel of his nobles, were abolished; some were permitted to remain; some were altered, and other new ones were ordained: this alteration and modification of the Welsh law was as follows:

First, respecting the magistrates and officers of justice it was ordained, that the *justitiarius de Snaudon* should have the keeping of the king's peace there and in the parts adjacent, and should administer justice according to the king's writs, hereafter to be mentioned. Further, that there should be sheriffs, coroners, and bailiffs of comotes in Snaudon and the parts adjacent; that there should be a sheriff in Anglesey, one in Carnarvon, one in Merioneth, and one in Flint; the jurisdiction of which last was to extend to the town of Chester; and he was, for the future, to be attendant on the king's *justitiarius* of Chester (which officer of justice of Chester is mentioned as existing in the former reign),<sup>2</sup> and should be answerable for issues at the exchequer of Chester. Coroners were in future to be elected in these counties by the king's writ, inserted in the statute for that purpose; bailiffs of comotes were to be appointed; and they are thereby enjoined to do their duty, as directed by the *justitiarius* and

<sup>1</sup> Vide Penn. *Tour in Wales*, vol. ii., appendix.

<sup>2</sup> St. de Scac., 51 Hen. III., s. 5.

the sheriff. Besides the above sheriffs, who were appointed for Snaudon and the parts adjacent, the statute directs that there should be a sheriff in Carmarthen, and another in Cardigan and Lampader, together with coroners and bailiffs of commotes, as in the former.

The sheriff was to hold his county from month to month; but his tourn only twice a year, that is, after Michaelmas and Easter. In his county he was to hold plea of the following actions, with or without a writ: Of trespasses against the king's peace; of the caption or detention of cattle, or *de vetito namio*; of debt, and other breaches of contract. At his county court, he, together with the coroners, was to receive all presentments of felonies and other offences that had happened since the last county; when *Waleschery*,<sup>1</sup> in case of death, was to be presented, the presentment enrolled, and the offenders prosecuted to outlawry, the same as in England: the same in appeals *de plagâ*, mayhem, rape, burning, and robbery.

All persons residing within the commote were to attend at the tourn, except religious men, clerks, and women. The sheriff was then to inquire, by the oath of twelve discreet and lawful men, concerning the *capitula coronæ*; which are inserted in the statute, and are the same, except some local matters, with those delivered to the justices itinerant in England: the jurors were next charged to make presentment of offenders, in the manner as has already been described in the proceedings of the eyre.<sup>2</sup>

As to the coroners, it was ordained that there should be one at least in every commote, who should be chosen *in pleno comitatu* by the usual writ, and be sworn before the sheriff to be faithful to the king, and discharge the office of a coroner with fidelity. Then the manner of holding inquisitions *super visum corporis*, and other parts of his office, in taking appeals, abjurations, and the like, are described in the same way as the office of coroner in England.<sup>3</sup>

After this account of officers, and their duty, there follow forms of the most common original writs for the use of the inhabitants of Wales—namely, a writ of novel disseisin of freehold, of disseisin of pasture, a writ of nuisance, and of mortaucestor; a writ, or commission,

<sup>1</sup> *Vide ante*, 284, of *Englescherry*.    <sup>2</sup> *Vide ante*, 267.    <sup>3</sup> *Vide post*, 428.

appointing a justice and certain associates, whom he should chose, *AD ASSISAS novæ disseisinæ et mortis antecessoris CAPIENDAS*; and another writ, directing the sheriff to cause all such assizes to come *coram nostro justitiario*, which was the return in the above original writs. It was directed that co-heirs, or any who could not properly have a writ of mortauncestor, should have a writ of that kind *in suo casu*, adapted to their case; by which, probably, was meant a writ *de consanguinitate*. Next follows a form of *præcipe quodd reddat, etc., quodd ei deforceat*, for cases both of right and possession. This writ, like the former, was to be returnable *coram justitiario nostra*; but it might also be had *coram justitiariis in banco*. After this there is a writ of dower *unde nihil*, a writ of debt, and a writ of the same nature in the *detinet*, instead of *debet*; which has since been called a writ of *detinue*. This is remarkable for being the first mention of such a writ. Writs of *debt* were not to be *coram justitiario*, if for a sum under forty shillings; but such small sums were to be sued for in the county court, and in commotes. In case a plaintiff chose to sue in the county, the form of a *justicies* is given by the statute; such suits might be removed, by *pone, coram justitiario*. To these succeed a writ of covenant, with a *justicies* and *pone*; a writ for appointing an attorney; a writ *de coronatore eligendo*.

When the statute has given all these writs, it goes through the proceedings in each, much in the way in which those actions were conducted in England; only in the allegations of the parties it was recommended that the rigor of practice which declared, *qui cadit à syllabâ, cadit à totâ causâ*, should not be tolerated. Among others, it sets forth the form of proceeding in trespass, but does not give any form of a writ.

Some alterations and regulations were made concerning property (a). It had not been the custom in Wales for

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(a) As already shown, though the object was to assimilate the laws of the two countries, there was very little found to alter, the reason being that both had been derived, in the main, from the same source, the Roman. A remarkable illustration of this is afforded in the instance above mentioned, that of dower. The Roman law did not recognize dower, in our sense of the word,—as an endowment of the wife by the husband,—but rather in the sense of an endowment of the husband by the wife, as in what our law called *maritagium*. It is thus accounted for why the Welsh had no law of dower—their law being the old Romanized British law. As to inheritance, it has

women to have a title to dower; but now it was declared, that in future they should have dower. Inheritances that had been partible among the heirs, time out of mind, were to continue in the same manner as had been before used; only bastards were no longer to be allowed to inherit. Women, being co-heiresses, were in future to have their equal shares of the inheritance, though contrary to the former custom of Wales. The people of Wales had expressly prayed that the following regulations might be established: *first*, That the truth of a fact might be inquired of by good and lawful men of the vicinage, chosen by the consent of parties; *secondly*, That in all actions for movables, as upon contracts, debts, suretyships, covenants, trespasses, chattels, and the like, they might still retain the Welsh usage; which was, that when a matter could be proved *per audientes et videntes*, and a plaintiff had brought witnesses so qualified, whose testimony could be depended on, to prove his declaration, he should recover his demand against the adverse party; and in cases where there could not be a proof *per audientes et videntes*, that the defendant should be put to purge himself with a greater or less number, according to the quantity and quality of the thing or fact; *thirdly*, That in thefts, if a person was taken with the thing in his hand, he should not be suffered to purge himself, but be judged *pro convicto*: all which were granted, except only in cases of theft, burning, murder, homicide, and manifest and notorious robberies, in which the order of the law of England was to be observed.

This is the whole of the *statutum Walliæ*; which con-

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already been adverted to; and it may be observed, that the law of Rome had fluctuated and varied on that head. It will be observed, again, in the above passage, that the Welsh had no barbarous ordeal or brutal battle, but an intelligent system of trial by persons most likely to know the truth, and chosen by the parties: in substance the Roman system, at which the Anglo-Normans had only recently arrived, after centuries of slow progress; whereas these Romanized Britons had retained it ever since the time of the Romans, when they acquired it. Again, there were provided, in cases where the trial by witnesses or jurors was not available as to the facts, a system of purgation, by oath of witnesses to the *credil* of the parties, very different from the absurd miracle of God, which at this very time the English were still so superstitious and so stupid as to desire; for in the *Mirror* it is actually stated as one of the "abuses" of the law that the "miracle of God," *i. e.*, the ordeal, was not allowed, as it had been! This superiority of the Romanized Britons in the principality is a remarkable proof of the vitality of the Roman laws and constitution.

cludes with a reservation to the king of a power to interpret, add to, or diminish it as he pleased, and thought it expedient for the good of the country. After this follows, *in cujus rei testimonium sigillum, etc.* The king affixed his seal, and so executed it rather in the form of a charter than an act of parliament. Thus was the judicial polity of the principality settled in the form in which it continued till the reign of Henry VIII., when some further steps were taken for uniting it more closely with England, by a fuller participation of our laws.

The *ordinatio pro statu Hiberniæ*, 17 Edward I., contains eight chapters of regulations in matters of a judicial nature. It appears from this act, that the English law prevailed in Ireland, with all its formalities. We find here mention of the king's writs, of assizes of novel disseisin, of the king's justices, the chancery, exchequer, and the like.<sup>1</sup> The first chapter of this statute ordains, that neither the king's justice of Ireland, nor any other officer, should purchase lands or tenements within the limits of his bailiwick, without a license from the king, under pain of forfeiting such purchase to the king. No purveyance was to be made by the king's justice of Ireland, or any other officer, but in cases of necessity; and then it was to be by the advice of the greater part of the council in those parts, and by a writ awarded out of the chancery of Ireland, or out of the chancery of England, by the king's order.<sup>2</sup> They were likewise forbid to arrest ships of the king's subjects who were ready to give security not to trade with enemies; and any officer of the king doing otherwise, was to satisfy the complainant in double damages, and be punished by the king.<sup>3</sup> The fees for the king's seal, and those due to the marshal, were regulated.<sup>4</sup> The justice of Ireland was no longer to have power of pardoning for the death of a man, or other felony, but by the special command of the king.<sup>5</sup> No officer was to receive an original writ without the seal of Ireland; nor was process to be made under any other seal, except only the seal of the exchequer of Ireland, for matters peculiar to that court.<sup>6</sup> Assizes of novel disseisin were not to be adjourned or delayed by the

<sup>1</sup> For English statutes binding Ireland, *vide* Harris's *Hibernica*, part ii., pp. 75 to 142, etc.

<sup>2</sup> Ch. 1.

<sup>3</sup> Ch. 3.

<sup>4</sup> Ch. 4, 5.

<sup>5</sup> Ch. 6.

<sup>6</sup> Ch. 7.



writs or letters of the justice of Ireland, except only in the county where he was present, and during the time he should remain in that county.<sup>1</sup>

The other statutes, which we have before mentioned as of a political nature, relate to the observance of *Magna Charta* and the Charter of the Forest. Confirmations of the charters. During this reign several acts were passed for confirming and strengthening these great pillars of the constitution. In the thirteenth year of this reign, the king was entreated by the parliament to confirm all former charters of the kings, his predecessors: a form of *inspeximus* and confirmation was accordingly agreed upon, not only to be prefixed to the Charter of Liberties, but also to charters of donation to individuals, as is to be seen in a public instrument entitled *Forma Concessionis et Exemplificationis Chartarum*, 13 Edward I., st. 6. Further, respecting charters of donation, it was ordained, that should a doubt arise upon any articles therein, the matter should be argued before the treasurer and barons of the exchequer, together with the justices of both benches.

But, in the twenty-fifth year, there was a more solemn confirmation of the Great Charter in the statute called *Confirmationes Chartarum* (a). This contains seven chap-

(a) Not, it will be observed, until near the end of the reign, nor, as history shows, even then, until coerced and extorted by absolute necessity. And it was entirely to the pecuniary necessities of the monarch we owe both the legal and political improvements which were effected in this reign. The mere confirmation of the charters, indeed, would have been of little importance, since they had been confirmed again and again, but in vain. The most important of the demands made upon the crown was that by which it was called upon to relinquish the claim of levying taxes without the consent of the nation, which had been already yielded by John in *Magna Charta*. But in the great charter of Henry III. it was omitted and reserved, and hitherto had been evaded; and it was now most reluctantly conceded (*Lingard's Hist. Eng.*, ii., c. 7). When the barons took up arms against John, they exercised the right of resistance to oppression; but they took no securities, they made no lasting provision for the time to come. In the second stage of the contest the national leaders obtained, in the Great Charter, a solemn recognition of the rights of the people, and some provisions which, by reserving to a national assembly the power over money taxes, laid the foundation of a permanent and effectual control over the crown. Still the means of redressing grievances lay chiefly in an appeal to arms, a coarse and perilous expedient, always of uncertain issue, and the repetition of which is incompatible with the peace and order of society. Such were the plans of government in the Great Charter, the provisions of the Oxford, and the *mise* or agreement of Lewes. The third epoch is distinguished by the establishment of a permanent assembly, which was on ordinary occasions

<sup>1</sup> Ch. 8.

ters. The first ordains that the Charter of Liberties and of the Forest should be kept in every point, and that they should be sent under the king's seal as well to the justices of the forest as to others; to all sheriffs and other officers, and to all the cities in the realm, accompanied with a writ commanding them to publish the said charters, and declare to the people that the king had confirmed them in every point. All justices, sheriffs, mayors, and other ministers, were directed to allow them when pleaded before them;<sup>1</sup> and any judgment contrary thereto was to be null and void.<sup>2</sup> The charters were likewise to be sent under the king's seal to all cathedral churches, there to be kept and read to the people twice a year.<sup>3</sup> It was ordained, that all archbishops and bishops should pronounce sentence of excommunication against those who, by word, deed, or counsel, did anything contrary thereto; which curses were to be pronounced twice a year; and if any bishop was remiss in doing this, he was to be compelled and distrained to do it by the archbishops of Canterbury and York.<sup>4</sup>

Thus far provision was made not only for the observance but likewise for the preservation of the charters. The re-

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capable of checking the prerogative by a quiet and constant action, yet strong enough to oppose it more decisively if no other means of preventing tyranny should be left. Hence the unspeakable importance of the new constitution given to parliament by Simon de Montfort; hence, also, arose the necessity under which the succeeding king, with all his policy and energy, found himself of adopting this precedent from a hated usurper. It would have been in vain to have legally strengthened parliament against the crown, unless it had been actually strengthened by widening its foundation, by rendering it a bond of union between orders of men jealous of each other, and by multiplying its points of contact with the people, the sole allies from whom success could be hoped. The introduction of knights, citizens, and burgesses into the legislature, by its continuance, showed how exactly it suited the necessities and demands of society at that time. No sooner had events thrown forward the measure, than its fitness to the state of the community became apparent (*Mack. Hist. of Eng.*, v. 1.) It was to this the confirmation of the charters, and, what was far more important, the guarantee of their observance, are to be ascribed. The monarch had convened parliaments, which comprised representatives of the counties, and towns, and cities, who alone had the power of granting him subsidies or supplies; and in consequence of the power they thus acquired, the confirmation of the charters was granted, containing the all-important guarantee that no supplies should be granted but with the common consent of the realm—that is, of the representatives of the realm—in such a parliament assembled. The power of parliament was thus enlarged by this monarch, as by his successors, not only to facilitate grants of money, but to share harsh acts of government, and introduce innovations too daring to be hazarded by the single arm of a wary tyrant (*Mack. Hist. of Eng.*).

<sup>1</sup> Ch. 1.<sup>2</sup> Ch. 2.<sup>3</sup> Ch. 3.<sup>4</sup> Ch. 4.

maintaining three chapters of this statute were to guard the subject against the levying of unlawful aids. The king had, in the present parliament, obtained some aids and subsidies for maintaining a foreign war. Though these grants were with consent of parliament, they created some jealousies, an idea having prevailed that the subject was not bound to contribute towards carrying on the king's wars out of the realm. It is said that on this occasion Bohun, Earl of Hereford and Essex, the high constable of England, and Bigot, Earl of Norfolk and Suffolk, and marshal of England, being personages who, from their office in the king's armies, seemed called upon to interfere in such a crisis, presented a petition to the king this year in behalf of the commons, in consequence of which it was now ordained that such aids, tasks, and prizes should not be drawn into custom or precedent.<sup>1</sup> Further, the king granted for him and his heirs, as well to archbishops, bishops, abbots, priors, and other persons of holy church (who had been taxed likewise in their church-lands), as to earls, barons, and to all the commonalty of the land, that he would on no account take such aids, tasks, nor prizes, *but by the common assent of the whole realm*,<sup>2</sup> and for the common benefit thereof, *saving* the ancient aids and prizes due and accustomed,<sup>3</sup> which meant, probably, the aids due by reason of tenure. This is the first mention in the statute-book of a renunciation of right to levy money on the subject without consent of parliament. There had been a like declaration in the charter of John; but we have seen that it was omitted in that of Henry III.<sup>4</sup> Further, because there had been a particular outcry against a tax of forty *souds* upon every sack of wool, it was declared this should not be again levied without the common assent and good-will of the commonalty of the realm.<sup>5</sup>

This statute, being in the form of a charter, was sealed with the king's great seal at Ghent, in Flanders, on November 5th, in the twenty-fifth year of his reign, as appears by a memorandum upon the roll. The form of excommunication pronounced by the Archbishop of Canterbury against the breakers of it follows in the next public instrument, entitled *Sententia Domini R. archiepis-*

<sup>1</sup> Ch. 5.<sup>2</sup> Ch. 6.<sup>3</sup> Ch. 7.<sup>4</sup> *Par commun assent de tut royaumes.*<sup>5</sup> *Vide ante, c. viii.*

*copi super præmissis*, stat. 25 Edw. I. stat. 2. The next notice of the two charters of liberties is in the preamble to the statute *de finibus levatis*, 27 Edw. I., where the king refers to the former confirmations thereof, and solemnly ratifies them.

In the next year something more was done for confirming the charters. We find there the statute of *articuli super chartas*, 28 Edw. I., stat. 3. This act complains that the charters, notwithstanding the several confirmations of them, were not observed; and this is attributed to there being no certain penalty prescribed for the violators of any points thereof (a). They are, therefore, again confirmed by this act; and the following method was appointed for enforcing the observance of them, and for the punishment of offenders. The charters are directed to be delivered to every sheriff in England, under the king's seal, to be read four times a year to the people in full county — that is, at the next county after St. Michael, Christmas, Easter, and St. John. For the punishing of offenders, the commonalty were to choose in every county court three *able men*,<sup>1</sup> knights, or other lawful, wise, and well-disposed persons, who should be assigned and sworn justices by the king's letters-patent under the great seal, to hear and determine, without any other writ than their commission, such complaints as should be made of those who offended in any point against the charters within the county, as well within franchises as without, and as well of the king's officers out of their places as of others. They were to hear such complaints from day to day, without admitting any of the delays which were

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(a) The want of punishments for infractions of the charters is alluded to by the author of the *Mirror*; but there was, as already observed, a necessity for something beyond the mere enactment of punishments, viz., a power to execute and enforce them. It was in this want of guarantees or securities lay the great difficulty of the age, as Mackintosh and Guizot have pointed out. And these guarantees were but gradually obtained, as the power of law grew up under the protection of the increasing power of parliament. There was thus a close and indeed inseparable connection between the growth and progress of our political and legal institutions. Law could only be administered and justice guaranteed by a judicature having the will and the power to administer justice according to law; and this will and power could only, as experience had abundantly attested, be obtained under the influence, the control, and the protection of parliament.

<sup>1</sup> Such is the term given by the translator to the words *prodes homes*; that is, *prud'homme*, from which there is formed an abstract word, *prud'homie*.

allowed by the common law, and to punish all those who were attainted of any trespass against the charters, by imprisonment, ransom, or amercement, according to the trespass. The statute expressly declares that this special proceeding shall only be in cases where there was no remedy before by the common law. It was enacted that if the three commissioners could not all attend, two should be sufficient. The king's sheriffs and bailiffs were to be attendant on these justices. Besides these regulations for the observance of the two charters, several *articles*, as the act calls them, were enacted for amendment of the law, not of less importance than the above provisions. These will be considered in their proper place.

The next public act upon the subject of the charters is the *Ordinatio Forestæ*, 33 Edw. I., stat. 5, containing some regulations about the purlieus of forests (a). In the next year is the famous statute *de Tallagio non concedendo*, 34 Edw. I., stat. 4; and another statute concerning the forest, called likewise *Ordinatio Forestæ*.

The statute *de Tallagio non concedendo*, like the *Confirmationes Chartarum*, was occasioned by the question about levying money for carrying on foreign wars.<sup>2</sup> The king had required that every freeholder of £20 per annum<sup>3</sup> should attend him into Flanders, or pay him a compensation in lieu thereof, to enable him to go to war with the king of France, in behalf of Guy, earl of Flanders. To this the constable and marshal, who distinguished themselves on the former occasion, made an opposition, and being supported by many potent and steady adherents, they at length compelled the king to make a similar declaration with that in the *Confirmationes Chartarum*. There was now more cause for murmuring than before; for the king had, the last year, levied a talliage on all cities, boroughs, and towns, without assent of parliament; to quiet his commons, therefore, as well as to satisfy his nobles, the king consented in the present statute to a parliamentary declaration about levying money. It was declared that no talliage or aid (which included those

(a) Most of the old statutes are repealed, but they are not the less *illustrative of legal history*.

<sup>1</sup> Stat. 5.

<sup>2</sup> Of this statute, *vide* Mad. Exch., vol. i., 762.

<sup>3</sup> This is the value of a knight's fee by the statute *de militibus*, in the next reign.

feudal aids that had been excepted in the statute of *Confirmationes Chartarum*) should be imposed or levied by the king or his heirs, without the will and assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the commons of the realm.<sup>1</sup> Nothing was to be taken by way of *maletoute* (a tax before mentioned) for sacks of wool.<sup>2</sup> Respecting purveyance, which was in the light of a very severe tax, it was declared, as it had been on other occasions during this reign, that no officer of the king should take any corn, leather, cattle, or other goods, of any one, without the consent of the owner.<sup>3</sup>

After these provisions concerning taxation, the following general declarations were made in favor of liberties claimed by the subject. That all men, both clergy and lay, should have their laws, liberties, and free customs as freely and fully as they ever were accustomed to enjoy them;<sup>4</sup> and if anything was introduced by this, or any former law or custom contrary thereto, it was declared null and void.<sup>5</sup> There was at the same time a free pardon of the constable and marshal, and all their adherents, who had refused to attend the king into Flanders.<sup>6</sup> For the better observance of the charter, it was directed that all archbishops and bishops forever should read it in their cathedral churches, and openly pronounce a curse against all those who violated it in any point. The king put his seal to this statute, or rather charter, as did the archbishops and bishops, who all voluntarily swore to observe the tenure of it in all causes and articles, according to the best of their power.<sup>7</sup> Thus was the statute *de Tallagio non concedendo* sanctioned with the solemnities attending the several confirmations of the charters of liberties, as a security of equal importance with those great supports of our free constitution.

The *Ordinatio Forestæ*, passed in the same year, is ushered in with a preamble expressing very feelingly the king's compunction for the hardships suffered by his subjects from the forest laws. One great cause of these was the abuse of indictments, which, instead of being presentments by the country, were dictated

<sup>1</sup> Ch. 1.      <sup>2</sup> Ch. 3.      <sup>3</sup> Ch. 2. *Vide post*, 28 Edw. I., stat. 3, c. ii.

<sup>4</sup> *Ita liberè et integrè sicut eas aliquo tempore meliùs et plenius habere consueverunt.*

<sup>5</sup> Ch. 4.

<sup>6</sup> Ch. 5.

<sup>7</sup> Ch. 6.

by one or two of the foresters, upon which attachments issued, and the parties were subjected to all the penalties of law, though perhaps clearly innocent of any offence (a). These foresters, it seems, were too numerous, and derived their whole subsistence from the plunder of the forest, in taking wood, venison, and the like, to their own use. To remedy all these mischiefs it was ordained as follows: First, that all trespasses *de viridi et venatione* should be presented by the foresters within whose bailiwick they were committed at the next swainmote, before the foresters, verderors, regardors, agistors, and other ministers of the forest; that the truth should be there inquired of by the oath as well of knights as other good and lawful men, and the presentment sealed with the seals of the presentors, otherwise to be void;<sup>1</sup> which regulation about the seals of the presentors had been before made (as will be shown hereafter) in regard to indictments at common law. If any of the aforesaid ministers happened in the meantime to die, the justice of the forest was to put in others, that there might be a sufficient number to make the presentment. Other officers were to be appointed as before; only verderors were to be elected by the king's writ.<sup>2</sup> None of the before-mentioned ministers were to be put on assizes, juries, or inquisitions out of the forest.<sup>3</sup> Any officer who surcharged the forest was to be removed from his place, and imprisoned at the discretion of the justice of the forest; and at every swainmote inquisition was to be made of such surcharges and oppressions committed by the officers of the forest.<sup>4</sup> The justice of the forest was empowered, in the presence of the king's treasurer, to impose fines without waiting for the eyre.<sup>5</sup>

(a) Thus, even long after this statute, in the reign of Edward III., it appeared that it was a justification for arresting and imprisoning a man that the defendant was forester in fee of a forest, and that at a certain swainmote it was presented by the foresters, verderors, regardors, and agistors, that the plaintiff had hunted the deer in the forest, upon which the defendant came to him and requested him to find pledges to answer for it before the justices of oyer and terminer in the county; but he refused to do so, for which he was arrested and imprisoned until he should do so, according to the statute; and then it was said that the party could not traverse the presentment of the foresters, though as to that the reporter added a query (*Year-Book of 45 Edw. III.*, fol. 7). A man could have a "free chase," though not in a royal forest, without a grant (42 *Edw. III.*, fol. 2); and an action would lie for hunting the deer in a free chase (43 *Edw. III.*, 8).

<sup>1</sup> Ch. 1.<sup>2</sup> Ch. 2.<sup>3</sup> Ch. 3.<sup>4</sup> Ch. 4.<sup>5</sup> Ch. 6.

These, with some regulations of a temporary kind, were all the alterations made in the system of forest law by this statute.

These are all the acts which may be considered as of a political nature. The other statutes of this king relate to the common justice of the kingdom; the principal of which are, the statute of Westminster 1, statute of Gloucester, Westminster 2, Westminster 3, and *Articuli super Chartas*. It is to these that Sir Matthew Hale chiefly alludes in what he says of the improvements made by this king in the administration of justice. By these, many grievous and impracticable parts of our law were corrected or removed, and others more apt and effectual substituted in their place, which have stood ever since, incorporated into, and, as it were, a part of the common law. We shall now treat of these statutes in the order in which they were made.

The statute of Westminster the first (*a*) (so called to distinguish it from two subsequent statutes, denominated likewise from parliaments holden at Westminster) is the first in this reign, and is stat. 3 Edw. I. It contains fifty-one chapters; and was ordained, says the general preamble, "because the state of holy church had been evil kept, and the prelates and religious persons of the land grieved many ways, and the people otherwise entreated than they ought to be; the peace less kept, and laws less used, and offenders less punished than they ought to be." It provides, therefore, in the course of fifty chapters, for the correction of many irregularities in the exercise of certain privileges and rights, and for the better administration of justice, both civil and criminal. The first chapter ordains<sup>1</sup> generally, that the peace of the holy church and of the land be well kept and maintained in all points; and that common right be done to all, as well poor as rich, without respect of persons. It then provides against an abuse which had lain very heavy upon religious houses and ecclesiastical dignities. Persons who were descended from the founders, and officers in public employments, used to claim the liberty of residing there on their journeys, with board and lodging for themselves, servants, and

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(a) A. D. 1273.

<sup>1</sup> Ch. 1.



horses; hunting in their parks, and taking other liberties without the consent, and generally much against the inclinations, of the persons encroached upon. All such intrusions are forbid, under pain of fine and imprisonment; though this restraint, says the act, was not to withdraw the grace of hospitality from those who needed it.

Some points of the common law were recognized, and more firmly established. Concerning wrecks of the sea, it is *agreed*, says the statute,<sup>1</sup> that Of wreck. where a man, a dog, or a cat, escape alive out of the ship, such ship or barge, or any therein shall not be adjudged wreck;<sup>2</sup> but the goods shall be saved and kept by view of the sheriff, coroner, or king's bailiff, and delivered into the hands of such as are of the town where the goods were found; so that if any within a year and a day sued for them, and proved them to be his, or his lord's or master's, and that they were lost while in his care, they should be restored; if not, they were to belong to the king, and to be seized by the sheriff, coroners, and bailiffs, and delivered to the inhabitants of the town, who should be answerable for them, as wreck belonging to the king, before the justices: in like manner, where the wreck belonged to any other person (*a*), a breach of the above regulation was to be punished with imprisonment and fine.

A provision was made to secure the freedom of all elections; a more important object, perhaps, than it is even at this day; for, at that time, sheriffs, coroners, and other officers, who had great sway in the administration of justice, were all elected by the people (*b*). It was with a

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(*a*) Wreck, *i. e.*, the privilege of taking it, might belong to a private person or public body, by special grant from the crown; and it is mentioned by Britton and Bracton as one of the "liberties," "privileges," or "franchises," which might be granted by the crown to subjects. Thus Bracton mentions "*wreckum maris*," as one of these franchises (*Lib. ii.*, c. xxix., fol. 56). So Britton mentions the franchise "*de aver wreck de meer*" (fol. x.). Both agree that for the absence of any grant or prescription it would belong to the crown; and see the subsequent chapter of this statute as to franchises held by subjects.

(*b*) Lord Coke, commenting upon this statute, says: It declared a principle of the common law, for, before the act, the electors had not their free nor due elections, for sometimes by force, sometimes by menaces, the electors were wrought to make election of men unworthy or not eligible, so as their

<sup>1</sup> Ch. 4.

<sup>2</sup> *Vide*, 9.

view to these, and not, probably, to any representatives of the people, that this law referred; however, as it is in general words, it may have a construction which will extend it to elections that have been appointed since for any purpose whatever. Because elections ought to be free, says the act,<sup>1</sup> the king commands, that no man by force of arms, nor by malice, or menacing, shall disturb any in making a free election.

A restraint was put on purveyance;<sup>2</sup> constables and chatellains were not to make prises (that is, to purvey) on persons who were not of the town where the castle was: and further,<sup>3</sup> if purveyors did not pay the money they

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election was neither due nor free. And, he adds, that the statute extends to all elections, and it would seem that it was not confined to popular or public elections, but included cases where parties had a right of option or election to exercise in matters of private right. Thus the statute *de prerogativa regis* said that a woman, married under age, might elect whether she would abide by her first husband—"Et tunc eligat illa utrum maluerit habere virum illum vel alium quem ei rex obtulerit," etc. And upon this it was argued, when the king claimed the value of the marriage, that the female ward had her election, and that it ought to be free; and Huls, "bachelor of law," argued much in Latin about it. And Paston said that the statute which gave an election did not declare the common law, for, at common law, the ward could not be forced to marry; only if she did not marry the person proposed by the guardian, then she must pay the penalty. On the other side it was urged, that if the ward had to pay the value the election could not be without compulsion, and so would not be free. And it was said, "Election est donec par le statute et electio est libera" (*Year-Book, 7 Hen. VI., fol. 11, c. xii.*). Lord Coke quite adopts the view that this was the common law, and that therefore the above act was declaratory; and he says, "This act extends to all elections, in counties, cities, universities, corporations, and other places" (*2 Inst., 169*). And then he refers to c. x., as to elections of coroners; as to which he says: "The office of a coroner was and is eligible in full county by the freeholders, by the king's writ *de coronatore eligendo*." The reason whereof was, that both the king and the county had a great interest in the due execution of his office, and therefore the common law gave the freeholders to be electors of him. And for the same reason of ancient time, the sheriff who had *custodiam comitatus* was also eligible. This, however, is very questionable. At all events, if popularly elected in Saxon times, the sheriff certainly was not so, after the Conquest, for instances are numerous of persons appointed by the king to be sheriffs of several counties for a course of years or for life; and it was a common thing to make a king's justice sheriff, or a sheriff king's justice (see c. ii.) The present king in the 20th year of his reign, in the *articuli super chartas*, restored, says Coke, the ancient election of sheriffs. "Le roy ad grant a son peuple que ils eient election de lour viscounts en chescun countie, ou viscount n'est de fee, s'ils voullient" (*28 Edw. I., c. viii., 13*). But this, it will be observed, had an important exception, and by subsequent statutes the election was virtually revested in the crown (*vide stat. 9 Edw. II. de visc.; 14 Edw. III., 7, 12; Rich. II., c. ii.*) The coroner, however, continues to be a popular officer.

<sup>1</sup> Ch. 5.<sup>2</sup> Ch. 7.<sup>3</sup> Ch. 32.

received at the exchequer, as it was a great inconvenience to the creditors of the crown, and a slander of the king, the amount was to be levied of their lands and goods; and if they had none, they were to be imprisoned (*a*). Another hardship on the public consisted of excessive tolls demanded (*b*) in some towns for the privilege of the market,

(*a*) This only appeared when the money had been actually received from the exchequer, so that there had been a species of embezzlement. Ordinarily the remedy for a tortious or wrongful injury, done by the king's officers under pretext of purveyance or otherwise, was by petition of right, as where the king's officers disturbed the taking of tithes (case of the prior of Christ Church, 31 *Edw. I., Rot. Parl.*, 59; *Ryley's Plac. Parl.*, 208.) So of a wrongful distress by the king's officers (John Mowbray's case, 33 *Edw. I., 1 Rot. Parl.*, 163). So for wool wrongfully taken for the king's use (Michael de Harla's case, 33 *Edw. I., 1 Rot. Parl.*, 163). So for wheat seized under pretence of a royal commission (14 *Edw. II., 1 Rot. Parl.*, 320). Purveyance, when really necessary for the support of the royal household, was in that age undoubtedly legal, as a part of the royal prerogative; but then it only amounted to pre-emption and implied payment, and it was grossly abused. Hence it had been the subject of one of the clauses in Magna Charta.

(*b*) Lord Coke's comment upon this is: "In the troublesome and irregular reign of Henry III. outrageous tolls were taken and usurped in cities, boroughs, and towns where fairs and markets were kept, to the great oppression of the king's subjects, by reason whereof very many did refrain from coming to fairs and markets, to the hindrance of the common weal; for it hath ever been the policy and wisdom of this realm, that fairs and markets, and especially the markets, be well furnished and supplied" (2 *Inst.*, 219). As to toll, more is said in the exposition of the second statute of Westminster, *vide post*. It is to be observed, that the present enactment is against outrageous toll, which seems to point to a toll unreasonable in amount, though Coke thought it also included tolls taken when none were due; as to which, however, in the treatise of Bracton, it appears there was a remedy provided already by the common law (*Bracton*, fol. 56). Lord Coke connects the exaction of tolls at markets with the ancient Saxon laws as to witnesses to contracts, for which he cites the *Mirror*, c. i., s. 3. He says: "Toll to the market is a reasonable sum of money due to the owner of the market upon sale of things tollable within the market. And this was at the first invented, that contracts might have good testimony, and be made openly; for of old time, secret contracts were forbidden, and the *Mirror* saith truth, for the ancient law was so." And then he cites the laws of Ina and Athelstan: "Nemo extra oppidum nisi proe-sente proposito aliusve fide dignis hominibus, quicquam emitto. Ne quis extra oppidum quid emit;" in which Coke says: "Oppidum is to be taken for market." He goes on to state that fairs and markets can only be by grant or prescription, and that the grant of a market does not necessarily imply a toll which requires a special grant, and that will require consideration if it be after the establishment of the market. He also points out that no toll can be claimed for things not sold, unless it be by custom, used time out of mind, which custom none can challenge that claim the market by grant within the time of memory, namely since the time of Richard I. (*Ibid.*, 221). He further points out, that the king (where he does not prejudice prior grantees) can grant special privilege of exemption from toll, for which he cites two old cases of this and the next reign, one the case of the abbot of St. Edward, *Rot. Parl. an. 18 Edw. I.*, fol. 2; and the other 2 *Edw. II.* the case

in others for murage, that is, for inclosing their towns; both these were restricted, under forfeiture to the king of the franchise so abused.<sup>1</sup>

Such were the miscellaneous articles, regulated by this statute, that could not be easily reduced to any of the heads into which the remainder of it will divide itself. These are *tenures* and *property*, the *administration of justice*, and the *criminal law*.

The services and fruits of tenure were an endless subject of jealousy and contest in these times. We have already seen what was done in the last reign to ascertain these

Wards.

claims, and temper the inconveniences resulting therefrom. The heaviest of these were wardship and marriage; and the following attempts were now made still further to regulate them. In the case of heirs being in ward to their lords,<sup>2</sup> it was provided and declared that *Magna Charta* should be observed,<sup>3</sup> that their land should not be wasted (a). All spiritual dignities were to be kept in like manner, without spoil or waste,

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of the merchants of Brummagham (*qu. Birmingham*) (2 *Inst.*, 221). With regard to the proper amount due for the toll, Lord Coke says: "I can tell what was due of old, and what was ordained in times past to be paid, for the *Mirror* saith: Que faïres et markets se fissent per lieus, et que achators de blee, et beasts donassent toll a less bailifes des seigniours de markets, ou de faïres, cest ascavoir maile de dix sours de biens, et demeynes, meynes, meynes and de puis, puis al afferant, essint que nul tol passast un denier de un manere de merchandize, et cest tolle fuit trove par testmoigner les contracts, car chescun privie contract fuit defendue" (*Mirror*, c. i., s. 3). But the value of money fluctuates, so that a penny in Saxon times might be equal to five shillings now; and Lord Coke adds, "But at this day, there is not one certain toll to be taken, but if that which is taken be not reasonable, it is punishable by this statute; and what shall be deemed in law to be reasonable, shall be judged, all circumstances considered, by the judges of the law, if it come judicially to be determined" (fol. 222).

(a) Many cases in the Year-Books in the following reign illustrate the system of wardships. Thus, in trespass brought by an infant, the defendant pleaded that the plaintiff's father held a house and land of the Prince of Wales by escuage, and died, whereupon the prince seized the wardship, and granted it to the defendant, who thereupon entered (22 *Assize* 44, fol. 12). Here, it will be seen, that the wardships were granted out by the feudal lords — no doubt, to the highest bidder, whose interest it thus became to oppress and impoverish the estate in order to derive the greatest profit. But the worst incident of wardship was, that it applied to the person as well as the estate. Thus, in an action against the prior of a convent for imprisoning the plaintiff twenty-six years before, in the 10 Edward III., the plea was, that the defendant seized the body of the plaintiff as ward, and as heir-apparent to his father, who held his land of the prior by knight-service (22 *Assize*, fol. 109, p. 85).

<sup>1</sup> Ch. 31.

<sup>2</sup> Ch. 21.

<sup>3</sup> Namely, c. 4, 5, 6. *Vide ante*, 324.

during their vacancy. Of such heirs who, being in ward, married without consent of their guardians before they were fourteen years old, it was declared that the statute of Merton should be observed;<sup>1</sup> and it was now further enacted,<sup>2</sup> that those who married without consent of their guardians, after they had passed fourteen years, should forfeit the double value of their marriage, as directed by that act; and moreover, that the ravisher or detainer of such ward should be answerable to the guardian to the full value of the marriage for the trespass, and make amends also to the king, as directed by the same act. Next, as to heirs female, that lords might not prevent their marrying in order to keep possession of their lands, it was ordained, that after they had accomplished the age of fourteen years, the lord should not keep their lands more than two years; and if in that time the lord did not marry them, they were to have an action to recover the inheritance, without giving anything for wardship or marriage. But, on the other hand, if a female ward wilfully refused a marriage provided by her guardian, being such as would not disparage her, he was entitled to hold the inheritance till she was twenty-one years old, and further, till he had taken the value of the marriage.

In protection of wards, it was provided, by another act,<sup>3</sup> that if a guardian or chief lord infeoffed any one of land that was the inheritance of a child who was in ward to the disherison of the heir, the heir should recover by assize of novel disseisin against the guardian and the tenant: and if the land was recovered, the seisin should be delivered by the justices to the next friend of the heir, to whom the inheritance could not descend, who was to improve it for the use of the heir, and answer for the issues when he came of age. If the infant was carried away, or anywise disturbed in pursuing the remedy here given, the assize might be brought by his next friend.

Another burden of tenure was the aids demanded by the lord *pur faire fil chevalier*, and *pur file marier*. These had never been ascertained,<sup>4</sup> but had been Of aids. levied at the discretion of the lord, who sometimes exacted unreasonable supplies in this way, and those much oftener than was necessary. It was therefore declared<sup>5</sup> that, for

<sup>1</sup> Namely, c. 6. *Vide ante*, 56.

<sup>2</sup> Ch. 22.

<sup>3</sup> Ch. 48.

<sup>4</sup> *Vide ante*.

<sup>5</sup> Ch. 36.

the future, there should be taken of a knight's fee twenty shillings only, and the same sum for land in socage of ten pounds, and so in proportion. This was not to be levied for making the lord's son a knight till he was fifteen years of age, nor for the marriage of his daughter till she was seven. If the father died before he had married his daughter, his executors were to be answerable out of his goods for the sum levied; and should the goods be insufficient, the heir was to be charged therewith. Thus far of the fruits of tenure, and of property in land.

Next as to the administration of justice. Before we consider such provisions as related to the discussion of causes, with the process and proceedings therein, we shall

first mention those made for putting the special  
Distresses. remedy by distress on a foot of convenience and effect. The provisions made by the statute of Marlbridge were of an important nature, and as they touched the mischief then\*mostly prevalent, it was above all things to be desired that they should be enforced (a). The first

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(a) The statute was explained by a case which arose in the reign of Edward IV. Trespass was brought upon the statute of Marlbridge, c. iv., *quod nullus de cetero duci faciat distringas*, etc., for driving a trespass out of one county into another, and the lord pleaded that the distress was for rent due for land held of a manor in another county, and that therefore the distress was driven thither. The court were divided in opinion as to whether this was an excuse. One judge said the lord could justify, for the intent of the statute was, that before the act the distrainer, even in case of distress *damage feasant*, could always drive the distress into another county, so that the owner could not know where he could sue replevin, and that therefore the words of the act were *si vicinus super vicinum hoc faciat*, etc., so that the mischief was that, and did not arise where the lord had a reason for removing the distress. A case was cited of the 1 Hen. VI. to that effect, and so the court seemed disposed to hold, but for another fault it would seem the plea was held bad (22 Edw., fol. 12). It has already been observed, in commenting upon the statute of Marlbridge, that wrongful distresses, or rather illegal seizures of cattle under color or pretence of distresses, were the most common form of oppression suffered by the body of the people in this age, and thus it is that the remedies for this species of wrong were of the greatest and most general importance; and one of the largest chapters in Britton, "*De prises des avera*," relates thereto. It touches upon the obvious hardship of detention of cattle, and provides a summary remedy, "*pur ceo que bestes et autres distresses ne soient mie trop longement detenus emparkes* (impounded) *que le viscount per simple plaintes, et par plegges, deliverent teles distresses*" (fol. 54). That is, that the sheriff, on account of the hardship, might give a summary remedy by replevin; and he might use force for the purpose, and distrain the disturbers, and arrest them (*Ibid.*). Then the bailiffs of the sheriff having got the cattle, and taken pledges for their return should it be accorded, there was a summary procedure provided for the determination of the plaint or suit of replevin, which is carefully described

statute of this reign is, in effect, nothing more than an injunction to observe it; for it says,<sup>1</sup> that some persons take and cause to be taken, beasts, and chase them out of the county, which is hereby forbid; and if any offend against this injunction, they shall be fined as directed by the statute of Marlbridge;<sup>2</sup> as shall those who take beasts wrongfully and distrain out of their fee, who shall, besides, be punished in proportion to the trespass. Thus this act is a confirmation of the statute of Marlbridge, with these differences: that statute speaks only of distresses; this, of all *takings*; that prohibits *all* distresses; this, only distraining of *beasts*; that concerns those *who take*; this extends to those *who cause* to be taken.<sup>3</sup>

The next statute on the subject of distresses goes much further towards removing this peculiar remedy from the hands of individuals, and submitting it to the officers of justice. It is provided,<sup>4</sup> that if any take the beasts of another, and cause them to be driven into a castle or fortress, and there withhold them against gages and pledges, whereupon they are solemnly demanded by the sheriff, or some other bailiff of the king, the sheriff or bailiff, at the suit of the plaintiff, taking with them the power of the county or bailiwick, should endeavor to make plevin of

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in this chapter x. of Britton (fol. 55). Or the party distraining might avow and justify the taking of the cattle on the ground that they were *damage feasant*, and detained as pledges for reasonable satisfaction; to which the owner might reply, that he offered to make "*dues amendes par les taxation de ascun de ses bones voisins (voisins) et il reson refusaunt*," etc. (fol. 56), or that he put the matter in arbitration, "*en le arbitrement de tiel et tiel, les quex arbitrement, que il n'y avoit nul damage fait*," etc. (fol. 57). This passage is interesting as showing how our ancestors settled the question — which has not been so satisfactorily disposed of in modern times — how the reasonable amends should be adjusted or ascertained. It will be observed that they still made good use of the simple and salutary proceedings by *arbitration of the neighbors*, which, as has been shown in describing the Saxon system, was what the court of the hundred or county virtually came to. Then the chapter goes on to describe the procedure in case the distress is justified on the ground of rent or other service being in arrear. Then it proceeds to declare that these who distrained for more than the value of their demand should be amerced for the outrage, "*soient en la mercy pour le outrage*;" and those who made a double distress — distraining again, pending the proceeding on a prior distress — were to be imprisoned and fined (fol. 60–62). There is no portion of the law of the age which will be found guarded so carefully, and described so particularly, as that relating to distresses.

<sup>1</sup> Ch. 16.

<sup>2</sup> Viz., ch. 2, 4, and 15. *Vide ante*, 326–330.

<sup>3</sup> 2 Inst., 191.

<sup>4</sup> Ch. 17.

the beasts taken (a); and if any obstruct them, or there is no one belonging to the lord or taker to give an answer, or make deliverance, he shall be warned of the matter; and if he does not forthwith deliver the cattle, the king, for the trespass and despite, shall cause the castle or fortress to be beaten down, and no permission shall afterwards be given to rebuild it. The plaintiff shall be recompensed by the lord, or him that took the beast, in double damages for all the loss he sustained after the first demand made by the sheriff or bailiff; and if he that took the beasts has not wherewith, the lord shall make the recompense upon the spot, at the time the sheriff or bailiff makes the deliverance. It was further directed that, in cases where the sheriff ought to deliver the king's writ to the bailiff of the lord of such castle or fortress, if the bailiff will not make deliverance, the sheriff (not waiting for a writ of *non omittas*, as heretofore) shall do his office without further delay; and not only where the writ of replevin is issued, but also upon a plaint, as authorized by the statute of Marlbridge.<sup>1</sup> The statute says, if these violences were committed in the marches of Wales, or anywhere else where the king's writ runneth not, the

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(a) The mischief before this act, says Coke, was that great men, when they took a distress of the beasts of their tenants or neighbors, to prevent the course of justice, or to enforce the owner to yield to their desire, would drive the beasts into a castle or fortress, and then detain and keep them, so as no replevy could be made according to the ordinary course of law, for that, in case of a subject, the sheriff could not break the castle or fortress. This act giveth remedy, that the sheriff, taking with him the power of the county, may make replevin. And note, says Coke, that every man is bound by the common law to assist the sheriff in his office for the execution of the king's writ, or the bailiffs who have the sheriff's warrant. So Bracton, "*Et si (vicecomes) aliquem invenerit resistentem assumptis secum (si opus fuerit) militibus et liberis hominibus de comitatu, ad sufficientiam capiat corpora hominum resistentium, et illos imprisona salvo custodiat*" (*Bracton*, lib. v., s. 443). And so in the statute Westminster 2, c. xxxix., it was provided that sheriffs should not falsely return that they could not execute the king's writs, but that the sheriff, in any such case, *assumpto secum posse comitatus sui*, should go to make execution (*Stat. West. 2. c. xxxix.*). And statute 2 Edw. III., c. v., provided that the sheriff should be bound to receive writs. And Coke cites a case in the reign of Edw. II., that a sheriff returned that he could not execute the king's writs for resistance of certain persons, and because he did not take the power of the county in aid of the execution, as the statute willed, he was amerced in twenty marks (19 Edw. II., title *Execution*, 24). And it is holden as a maxim of law, that it is not lawful for any man to disturb the ministers of the king in the due execution of the king's writs (2 *Inst.*, 194).

<sup>1</sup> *Vide ante*, 329.



king, who is sovereign lord over *all*, should do right to those who complained, a clause which at once asserted the king's dominion over that country,<sup>1</sup> and left the measure of its exercise at his discretion.

The first object that draws our attention in considering the administration of justice, is the jurisdiction of courts. Some provision was made towards abolishing inconvenient customs, and regulating the order of hearing and deciding causes (*a*).

A singular custom had prevailed in many cities, boroughs, and towns corporate (*b*), that if any person of one

(*a*) It has already been noticed that our municipal institutions are, along with the manorial, the most ancient of our institutions, having undoubtedly been derived from the Romans during their occupation of the country, whether in the form of municipal corporations, or guilds, or colleges, or incorporated companies, which some have supposed to have been of Saxon origin, but which were really of Roman origin. Much of our law was embodied in these institutions, and some of the most ancient of our local customs are the customs of cities which go back to the time of the Romans. Among these ancient customs was that of foreign attachment, as it was called, that is, the custom of attaching the funds of a debtor residing in some other or "foreign" city or town, and so not within the town in which the creditor lived. It is to that the following passage seems to refer.

(*b*) The custom of foreign attachments existed not only in such great cities as those of London and Bristol, in which it still prevails, but in many others in which it is obsolete, as in Exeter, Chester, or Oxford. Thus, in the old reports, there are cases of foreign attachment in Exeter (*Halse v. Walker*, 1 *Rolls Abr.*, 554). The earliest case in which the custom appears pleaded in the city of London is the case of *Bowser v. Collins* (*Year-Book*, 22 *Edward IV.*, fol. 30), where the custom is set out fully on the certificate of the Records of London. The custom is there stated thus: "That upon a plaint in the court of the mayor, if the defendant had no goods in the city by which he could be distrained to do right, but it appeared that any one in the city was indebted to him, then, unless the party could dispute the debt, it might be 'attached' in his hands, to answer the claim of the plaintiff." The principle of custom prevailed strongly in our law. Thus, it was enough if the proceedings in the court of a manor were according to the custom of the manor (*Year-Book*, 11 *Edward III.*, fol. 60). But then the custom must be reasonable, and the custom of foreign attachment was so; but that stated in the text was not so, and therefore was corrected and qualified by the statute *ut supra*. Customary local courts existed in almost all towns and cities for the recovery of debts from persons *residing* there; but in order to bring a suit in a local court, it was necessary that the debt should have arisen, and that the debtor should reside within the local limit of its jurisdiction. Hence, if the debts arose elsewhere, a difficulty arose; and, in favor of trade, a custom had arisen in our principal cities, that if the debtor had funds or assets in the place where his creditor lived, the latter might attach them; and so, if any one there was indebted to the debtor, the creditor might attach that debt, as payable to himself. This was not unreasonable; but it should seem that in some places it had become misunderstood or perverted, and hence the present enactment.

<sup>1</sup> This was seven or eight years before the conquest of Wales, and the making of the *Statutum Walliæ*. *Vide ante*, 375-378.

city, society, or merchant-guild was indebted to some one of another city, society, or merchant-guild, and if any other of that city, society, or merchant-guild came into the city, society, or merchant-guild where the creditor was, that the creditor might charge such foreigner with the debt of the other.<sup>1</sup> It was this custom that occasioned the following statute,<sup>2</sup> which enacts, that in no city, borough, town, market, or fair, should any foreigner be distrained for a debt of which he was not the debtor or surety; and such distress was to be immediately delivered by the bailiff of the place, or the king's bailiff, and the offender to be grievously punished.

There was another instance, though not so singular as the former, where these local jurisdictions exercised an authority that required some correction (*a*). Great men, and others who had particular jurisdictions to hold plea of contracts, covenants, and trespasses, when they were made or done within a certain precinct, would attach persons who happened to be within their franchises, by their

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(a) What follows is taken from Coke's comments on the chapter, which give the true reason for its enactment: "The prejudice to the king, in losing his fines in actions, and amercements, and other profits, upon a false supposal, not like to the general jurisdiction and power of the king's courts, through the whole realm; for wherever the contract, etc., were made, the matter being transitory, the plaintiff may allege it in what county he will, and the king can lose nothing" (2 *Inst.*, 229). He goes on to say, that, at the common law, one that had a particular jurisdiction within a manor or the like could not hold suit of a matter done *out* of the manor, because it was not within his jurisdiction (*Ibid.*, 23). And by statute 6 Rich. II., c. ii., it was enacted that even in the superior courts suits should be brought in the counties where the matters arose. It was of the essence of a local and inferior jurisdiction that it could only be exercised over parties within its local limits, and as to matters which had arisen within those limits, and not over "foreigners"—*i. e.*, parties residing out of those local limits, whence the phrase "foreign attachment," as applied to the peculiar and exceptional custom of attaching funds belonging to "foreigners," or parties residing out of the jurisdiction. The local courts were extremely numerous, being originally, there can be little doubt, the courts of the lords of manors or vills, whence it was that it was sufficient to set up a court according to the custom of the vill (*Year-Book*, 11 *Edward III.*, fol. 60), and there might be courts of lords of manors by prescription in hundreds (*Longo Quinto*, 349). If there was a castle in the vill, the court might be set up by prescription in the castle, the constable of the castle, like the steward of lord of a manor, being judge; and thus there was such a court in the Tower of London. There can be little doubt that these courts were often set up by *pretended* prescriptions, and that their jurisdiction was used as a cloak to the most atrocious oppressions. The oppressions exercised by constables of castles formed the subject of a clause in Magna Charta, and the evil still continued.

<sup>1</sup> *Fleta*, lib. ii., c. 56. 2 *Inst.*, 204.

<sup>2</sup> *Ch.* 23.

goods, to answer in their courts of contracts, covenants, and trespasses, which had happened out of their franchise, pretending the same were *transitory*, and, as such, might *be supposed* to be done within the franchise. This was greatly to the prejudice of the king's courts, and of the crown, which lost its fines and amercements; and it brought great inconvenience on the party, who was a stranger, held nothing of the franchise, and was only passing through it. It was enacted, therefore,<sup>1</sup> that any one who should cause a foreigner to be so attached should recompense him in double damages. Upon this act have been formed two writs: the one, in nature of a prohibition before the suit began, commanding that the party should not be arrested contrary to the form of this statute; the other, after the commencement of the suit, to recover the penalty of double damages, and the goods distrained.<sup>2</sup>

While measures were taking to secure the king's courts in possession of the proper objects of their cognizance, it was necessary to facilitate the despatch of causes there as much as possible. There was room for regulation in this particular. The method of hearing causes in the superior court had become very preposterous and disorderly. Many times the judges, yielding to the importunity of great men, and others, especially in the late turbulent reign, would put off the business of the day to some future time, and at that time, perhaps, hear some other matter appointed for a subsequent day: so that causes were delayed, parties disappointed, expenses incurred; and after all, when the matter was to be heard, the parties had neither advocate, witnesses, nor anything in readiness.<sup>3</sup> To remedy this, it was provided and commanded, as the act says,<sup>4</sup> by the king, that the justices of the king's bench, and of the bench at Westminster, should decide all pleas that stood for determination at one day, before any new matter was arraigned, or new plea commenced the day following.

Another impediment to the administration of justice arose from the canons of holy church, which forbade, under pain of excommunication, that any man should be sworn on the evangelists, or that any secular plea should be held at certain seasons. These are stated by Britton to be as follows: from the Septuagesima to eight days

<sup>1</sup> Ch. 35.  
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<sup>2</sup> Reg., 98. 2 Inst., 230.  
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<sup>3</sup> 2 Inst., 256.

<sup>4</sup> Ch. 46.

after Easter; from the beginning of Advent to eight days after Epiphany; in the Ember-days; the days of the great litanies; the Rogation days; the week of Pentecost; in the time of harvest or vintage, that is, from the feast of St. Margaret, 13th July, until fifteen days after the feast of St. Michael the Archangel, and in the solemn feasts of the acts of the saints. All these times, says our author, were allotted for prayer, to silence debate, to reconcile those that were at strife, or to gather the fruits of the earth, being works either of piety or charity.<sup>1</sup> If these seasons are compared with the schemes of *dies communes in banco*, in the former reigns,<sup>2</sup> they will be found nearly to fill up all the remainder of the year that was not occupied by the Terms, and, indeed, to encroach upon some of them. The circuits of the justices therefore, which, no doubt, were always held in the vacations, and sometimes part of a term, could not, consistently with the canons, be held without a dispensation, for which reason some of those seasons that stood most in the way were now broke in upon. Forasmuch, says the act,<sup>3</sup> as it is great charity to do right to all men, at all time, when need shall be, it was provided, by the assent of all the prelates, that *assizes of novel disseisin, mortmaince, and darrein presentment*, should be taken in *Advent, Septuagesima*,<sup>4</sup> and *Lent*, as well as Inquests.<sup>5</sup> This general standing dispensation of the canon in future was obtained of the bishops at the special instance of the king.

The remedy by assize was extended by several statutes to cases where it before had no effect. One  
Assizes.
 was, where escheators, sheriffs, and other bailiffs, under color of their office (*a*), would seize into the

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(*a*) That is, not *really* on behalf of the crown, but for their own profit, under color and *pretence* of acting for the crown. This, it is obvious, would be a mere act of private spoliation, and the parties would, at common law, be liable to the common remedy by action, if not also by indictment; and

<sup>1</sup> Britton, c. 53.

<sup>2</sup> *Vide ante*, 316.

<sup>3</sup> Ch. 51.

<sup>4</sup> If *Septuagesima* means here the same period as in the passage just quoted from Britton, it must include *Lent*; which therefore need not have been added, but *ex abundante cautela*. If that is not the sense, it can signify only the Sunday, which seems an absurd provision. In like manner *Quaresme*, which is the next word in the original, either means from Quadragesima, the first Sunday in Lent, to the end of it, or the whole of Lent from Ash-Wednesday.

<sup>5</sup> The expression in the statute seems to convey, that inquests used to be taken before at those seasons. This must have been by a dispensation.

king's hands the freeholds of individuals. The disseizee, in this case, had no remedy but to sue by petition to the king (a); but now it was enacted,<sup>1</sup> that he might either pursue the old course, or bring a writ of novel disseisin, in which he should recover double damages, and the offender should be amerced to the king. A provision was made respecting disseisins, which seems to be merely an affirmance of the common law.<sup>2</sup> It is for that reason, probably, that the act says, it was provided and *agreed*, that if any one be attainted of disseisin, with robbery of goods, and it be found by the recognitors in an assize of novel disseisin, the judgment should be to recover his damages, as well of the goods as the freehold; and the disseizor should make fine, and, if present, be ordered to prison: and so was it to be in all cases of disseisin with force and arms, though there was no robbery of goods.<sup>3</sup>

In cases of disseisin, if it happened either that the disseizee or disseizor died, leaving an heir within age, and a writ of *entry sur disseisin* was brought by the heir of the disseizor being within age, we have seen that the practice was for the parol to demur, until the full age of each respectively.<sup>4</sup> This occasioned great delay, and contributed rather to confirm the injury of the disseizor and wrongdoer. To correct this, it was provided,<sup>5</sup> that for the non-

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this perhaps may have been what was meant when it was said that, before the reign of the king, a man could have sued the king in the same way as a subject, and that this king ordained that the crown could only be sued by Petition of Right (*Bro. Abr.*, "Prerogative le Roy," fol. 2; 21 *Edward III.*, fol. 3). At all events, in this reign it was settled (as already seen) that this was the only remedy for wrongs done by the king's officers for or on behalf of the crown, as where goods were taken for the use and benefit of the crown by virtue of the prerogative of purveyance or otherwise (*vide ante*). But this, it is obvious, would not apply in cases when the officers really seized for their own use and benefit, under color and pretence of seizing for the king's use; and in such cases they would clearly be liable at common law, so that this was a mere declaratory enactment; and the practical difficulty would be in applying it, for how could the plundered subject know whether the king's officer seized for his own use or the king's? The author, however, is obviously in error in supposing (as he states in the next sentence) that when the officer seized *under color* of his office, the only remedy would be by petition of right. That was the remedy when the seizure *really* was on behalf of the king, that is, for the use and benefit of the crown; for if the king should be possessed, whether by right or wrong, the subject should have petition (*Year-Book*, 24 *Edward III.*, fol. 55).

(a) This is not so (*vide supra*).

<sup>1</sup> Ch. 24

<sup>\*</sup> *Vide ante*, 116.

<sup>2</sup> Ch. 37.

<sup>4</sup> *Vide ante*, c. vii.

<sup>5</sup> Ch. 47.

age of the one party or the other, in the above cases, the writ should not be abated, nor the plea delayed; and if it came to a trial, and the verdict was against the heir of the disseizée, he should have a conviction, or attaint (as it was now more commonly called) of the king's special grace, without paying anything. So equitable did they think it to take care that the infant, who was by this act precipitated into a contest at law, to which, by the old practice, he was not liable, should be protected by every legal means. The attaint, as it should seem, not being a writ, that was granted of course.

Attaints had just before come under the contemplation of the legislature,<sup>1</sup> when the first parliamentary provision was made respecting this peculiar and severe proceeding against jurors. "Forasmuch," says that statute, "as certain persons of this realm doubt very little to make a false oath, whereby many people are disherited, and lose their right; it is provided, that the king, *of his office*, shall from henceforth grant attaints upon inquests, in plea of land, or of freehold, or of anything touching freehold, when it shall seem to him necessary." Many doubts have arisen upon this act. Some are of opinion that, though an attaint did lie upon a false verdict given in a plea of land, yet the king, sometimes, would not grant it without a special suit made to him, which produced great delay, trouble, and expense. The reason of this difficulty in obtaining an attaint in a plea real, more than a plea personal, they say, was, that in the latter the party grieved had no remedy but an attaint, which should therefore be of course, but that in pleas real he might resort to an action of a higher nature, and therefore this extraordinary redress was not absolutely necessary. Others have been of a contrary opinion, namely, that an attaint did not at common law lie in *all* pleas real; and therefore this act provides, that the king shall grant it *ex officio*, that is, *ex merito justitiæ*.<sup>2</sup> Upon the whole, it seems to be the opinion of Lord Coke,<sup>3</sup> that an attaint lay at common law, both in pleas real and personal, and he founds that opinion, as he supposes, upon ancient writers and records.

However, it should seem, from the face of our statute-

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<sup>1</sup> Ch. 38.

<sup>2</sup> 2 Inst., 237.

<sup>3</sup> Ibid., 130.

book, that this writ was not so general as is stated by that learned author.<sup>1</sup> For, to say nothing of the statute now before us, we find by stat. 1 Edward III., sect. 6, that an attaint was thereby granted in a *writ* of trespass; and it is remarkable, that by stat. 5 Edward III. c. vii. an attaint is granted as well in pleas of trespass *without writ* as by writ, from which it looks extremely likely that each of these was an enlargement of this remedy, which extended no further than the express words of the statutes would carry it. Thus might Lord Coke's opinion be shaken by merely looking into the statute-book; but it is evident, from the former part of this history, that an attaint lay only against jurors in assizes when the assize was taken in *modum assisæ*, and not at all in other cases of freehold, nor in any personal action whatsoever.

It is true that from a passage in Bracton,<sup>2</sup> we must conclude that the writ of attaint was not, even in these cases, obtained in the ordinary course of the chancery, if the party had suffered any time to elapse; but that after a length of time the king was to be specially petitioned to allow it. However, it seems harsh to put any other construction upon this statute than the following: that perjury had grown so common, it was become necessary to declare that an attaint should be had not only in an assize when taken in *modum assisæ*, but in all *inquests* in pleas of land or of freehold, or of anything touching freehold.

If it is necessary to draw any particular inference from the words *de son office*, perhaps the following may be as natural as that above mentioned: not that the king shall grant these writs whenever applied for, *ex merito justitiæ* (a sense which the words *ex officio* surely never bore in any writer of Latin, whether good or bad), but that the king shall *ex officio*, without being sued and applied for, grant writs of attaint to make inquiry of the perjury of jurors. This is the true sense of *ex officio*; and this construction is supported not only by the earnestness with which the statute complains of the crime, but by the

<sup>1</sup> In confirmation of the statute-book, *vide Rot. Parl.*, 18 Edw. I., Petit. No. 93. Attaint denied in trespass; and the *Mirror*, where that writer complains of it as an abuse of the common law, that attaints did not lie in pleas personal as well as pleas real. This author, as is supposed, lived towards the close of the reign of Edward II., just before those acts of Edward III. were made (*Mirror*, ch. 5).

<sup>2</sup> *Vide ante*, c. vii.

words annexed to the grant of this new power to the king, *when it shall seem to him necessary*.

We have seen<sup>1</sup> that the champion in a writ of right was to swear *de visu et auditu proprio*, or that of his father; but things were so altered, that we find a statute made in this parliament<sup>2</sup> to the following effect: "Because it seldom happened, but that the champion of the demandant is foresworn, in that he sweareth that he or his father *saw* the seisin of his lord or his ancestor, and his father commanded him to deraign that right;" it is provided, that henceforth the champion of the demandant shall not be compelled so to swear. But the old oath in other points was to be observed.

Several provisions were enacted to facilitate the course of proceeding and process in actions. In a writ of dower *unde nihil habet*, the old plea of the tenant, whereby it used to be objected that she had received her dower of another man before the writ purchased, was taken away;<sup>3</sup> unless the tenant could show that she had received part of her dower of himself, and in the same town, before the writ purchased.

Vouching to warranty and casting essoins were put under some wholesome restrictions. These indulgences had been too much abused. In all real actions the tenant was permitted to vouch any person, though he or any of his ancestors never had anything in the land whereof he might infeoff the tenant or any of his ancestors. Again, the person vouched might in like manner vouch another; and when we consider that upon every summons *ad warrantizandum*, there must be a lapse of several months before a return of the writ could be had, the delay was infinite; while every voucher perhaps was false (a). To remedy this, it was provided as

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(a) This is taken from the commentary of Coke (2 *Inst.*, 240), who points out that if the vouchee, the party vouched to warrant the title, appeared, he was substituted for the tenant as defendant. "It seemed strange," he says, "that when the original *præcipe* was brought against the tenant of the land that the court should, upon that writ, hold plea between the tenant and vouchee; but it is more strange to make a question of that which hath received an ancient, continual, and constant allowance. The vouchee cometh in *in loco tenentis*, and in judgment of law as a tenant to the demandant" (*Year-Book*, 8 *Edw. III.*, 61, *Fitzherbert's Abr.*). The subject has a close connection with the subject of another enactment in the second chapter of West-

<sup>1</sup> *Vide ante*, c. viii.

<sup>2</sup> Ch. 41.

<sup>3</sup> Ch. 49.



follows:<sup>1</sup> First, as to writs of possession, as those of *mort-auncestor*, *cosinage*, of *aiel* (a writ in nature of a mort-auncestor),<sup>2</sup> *nuper obiit* (for so they now called a writ *de proparte*), of intrusion, and other similar writs; if the tenant vouched to warranty, and the demandant counter-pleaded it, and averred by assize or by the country, or otherwise, as the court should award, that the tenant or his ancestor, whose heir he was, was the first that entered after the death of him of whose seisin he demanded the land; then the averment of the demandant should be received, if the tenant would abide thereon; and if not, and he had not his vouchee ready to enter immediately into the warranty, he should be compelled to answer over; saving to the demandant such exception against the vouchee, if he would vouch over, as he had against the first tenant.

Moreover it was provided, that in writs of entry which made mention of degrees, none were to vouch out of the line there mentioned. As to writs which made no mention of degrees; as the writ of *entry in the post*; those writs, says the statute, shall not have place, but where the other

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minster as to the right of those in reversion or remainder to come forward and defend their title in a real action against the *tenant* of the freehold for life; all the old real actions, it is to be observed, being brought against the party seized of some freehold estate. The present enactment relates rather to the right of the tenant to call upon the party from whom he professed to derive title to come forward and defend it; and as the party could not do this unless he had himself been seized, the demandant could counter-plead, as Coke points out, denying his title, so as to show that he had no right to come forward; and the demandant might safely do this if the tenant had himself succeeded to the seisin on the alleged devolution of the title to the demandant, the principle being, that the third party had no right to come forward unless the tenant had really denied title under him as against the demandant. Hence the remedy provided by this chapter, the effect of which was that the demandant might, to avoid delay, insist on the matter being determined between him and the tenant on that simple issue, whether the latter *had* derived title from the third party vouched. This principle has never ceased to pervade the law of procedure in actions for the recovery of real property, and pervades it still. It was always a principle that the party who stood in the relation of remainder-man, or reversioner to the actual tenant sued, could claim to come forward; and the enactment in the second statute of Westminster enforced it as to real actions (*vide post*), and that principle was applied by the practice of the courts to the action of ejectment, in which the *landlord* was allowed to come in and defend (*Salkeld's Reports, title Ejectment*). But then it was only the real and actual landlord who stood in the relation of reversioner to the tenant who could thus claim to come in (*Ibid.*). And thus there has been an entire identity of principle on the subject for six hundred years, from the statutes of Westminster to the present day.

<sup>1</sup> Ch. 40.

<sup>2</sup> *Vide ante*, c. vii.

writs naming the degrees could not be maintained.<sup>1</sup> If the demandant would aver that neither the vouchee nor his ancestor had ever seisin of the land or tenement demanded, nor fee or service by the hands of his tenant or his ancestors, since the time of him on whose seisin the demandant declared, until the time the writ was purchased, whereby he might have infeoffed the tenant or his ancestors; the statute directs this counter-plea should be allowed in the before-mentioned writs of possession, as well as in a writ of right. After all these checks upon vouching, the statute, notwithstanding, has a saving for tenants, who though ousted of their voucher by the counter-pleas above-mentioned, yet might, perhaps, really have a charter of warranty: as if a person, who neither himself nor any of his ancestors ever had anything in the land, released to the tenant with warranty; and a writ was brought against the tenant, and he vouched the releasor, and the demandant counter-pleaded the voucher under this statute, namely, that neither he nor his ancestors ever had any seisin; then the tenant was ousted of his voucher; but yet, by the saving here made, he was to have his remedy over by a writ of *warrantia chartæ*.<sup>2</sup>

Essoins were as great a grievance in judicial proceedings as vouching to warranty. To limit these also, it was provided,<sup>3</sup> that because in writs of assize, attain, and *juris utrum*, for so the *assisa utrum* was now called (where the jurors, being returned the first day, suffered most by delays), the jurors had been troubled by reason of the essoins of tenants; therefore after the tenant had once appeared in court, he should be no more essoined unless he would make his attorney to sue for him; and if not, it was enacted that the assize or jury<sup>4</sup> should be taken by default.

There was an instance in which the delay of essoins was carried to an infinite length: that was where there was an essoining *simul et vicissim*, or as it was now called, a *fourcher by essoin*; as when a *præcipe* was brought against two or more tenants, and after each had had one essoin, which was by law due to them, they further delayed the demandant by alternately successive essoins. As for

<sup>1</sup> *Vide ante*, c. viii.

<sup>2</sup> 2 Inst., 240, 245.

<sup>3</sup> Ch. 42.

<sup>4</sup> *L'assise ou la juree*, to comprehend the two characters, the recognitors might by possibility appear in at the trial.

instance, a *præcipe* is brought against *A.* and *B.* *A.* is essoined, and *B.* appears, and hath *idem dies* given him; at which day *A.* appears, but *B.* casts an essoin; at the *dies datus* *A.* is essoined again, and *B.* appears; and so alternately: this was called *fourcher*, that is, *to divide*; because they divide themselves, in delay of the demandant by essoins and appearances, interchangeably.<sup>1</sup> The excess to which this practice was now carried, had crept in since the time of Bracton; or at least it was discountenanced by that author; for he lays it down expressly, that an essoin, in such case, should not be allowed at every appearance, on account of the infinite delay it would occasion.<sup>2</sup> The statute made to remedy this abuse<sup>3</sup> recites, that “forasmuch as demandants are often delayed, by reason that many parceners are tenants, of whom none can be compelled to answer without the other; or the tenants may be jointly infeoffed, in which case none may know his several right; and such tenants often *fouch* by essoin, so that every one of them has a several essoin;” it therefore enacts, that for the future such tenants shall not have an essoin, but only at one day, as a sole tenant has; so that they shall no more *fouch*, but have only one essoin.

Of all the various essoins, none put so effectual a stop to justice as that *de ultra mare* (a); by which persons would

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(a) This is an instance of an important principle embodied in an ancient form. Essoins were excuses for non-appearance. This enactment relates to one species of excuse for non-appearance that the party was *beyond seas*, and this plainly proves that, at common law, a party might be sued although he was beyond seas. The same thing is provable in another way: that is, because summons at the common law was not upon the person, but at the residence (2 *Inst.*, 254). Hence the essoin, or excuse for non-appearance, which was allowed for a period of eighty days. Thus Glanville says: “Est aliud genus essoniandi, et necessarium, cum quis essoniat se de ultra mare, et tunc si recipiatur essonium, dabuntur ipsi essoniato ad minus quadraginta dies” (lib. 1, c. xxv.). Hence Fleta says: “It could be avoided by showing that on the day of the summons the defendant was in England. Sunt tamen quidam, qui, cum, fuerint brevia super ipsos impretata, extra regnum se divertunt, ne summonitione sint preventi, ut sic jus petentis per essonium de ultra mare deferri possit, et unde provisum est, quod si petens offerat verificare, quod tenens fuerit in Anglia die summonitionis, et per tres septimanas sequentes, adjournetur essonium, et si alia die constare possit per inquisitionem, vel alia modo, quod tenens fuit in Anglia die summonitionis, etc., ita quod potuit rationabiliter præmuniri, vertatur essonium in defaultum” (Fleta, lib. 6, c. viii.). Which plainly implies that the summons was not necessarily served personally, or it would be idle to allege that the party was

<sup>1</sup> 2 *Inst.*, 250.

<sup>2</sup> *Vide ante*, c. vii.

<sup>3</sup> Ch. 43.

essoins themselves, though they were really within the realm the day of the summons. It was ordained,<sup>1</sup> that this essoin should not always be allowed, if the demandant would not challenge it, and be ready to aver that the tenant was in England the day of the summons, and three weeks after; but it should be adjourned in this form: that, if the demandant was ready at a certain day, by averment of the country or otherwise, as the court should award, to prove that the tenant was within the four seas the day he was summoned, and three weeks after, so that he might be reasonably warned by the summons, the essoin should be turned into a default.<sup>2</sup>

Thus far of these obsolete parts of our ancient jurisprudence; which we have ventured to treat so fully, that the history of our law may be better understood, and the causes and effects upon which the changes of our jurisprudence have at different periods turned, may be clearly distinguished.

We have seen what the *solennitas attachiementorum* was in the last reign.<sup>3</sup> The great delay occasioned by this tediousness of process made it necessary to shorten it very considerably. This design was begun by the statute of Marlbridge, which ordained that the second attachment should be *per meliores plegios*, and then should go the last or great distress.<sup>4</sup> Another step of this process was now taken off; for it was ordained,<sup>5</sup> that should the tenant or defendant, after the first attachment returned, make default, *immediately* the great distress should be awarded; and if the sheriff did not make sufficient return thereof upon a certain day he should be amerced. If he returned, that he had done execution in due manner, and the issues were delivered to the mainpernors, then he was commanded to return issues at another day, before the justices.

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in England on the day of the summons, for summons was always within the realm. If the party sued, when summoned, *i. e.*, at his residence, did not appear, nor cast an essoin, *i. e.*, make an excuse for his non-appearance, and he was within the realm, he could be outlawed, or his property could be taken if he was out of the realm (*Brooke's Abr.*, title "*Utlagary*" and "*Attachement des biens*"). And a party could be outlawed although out of the realm (*Ebro. v. Mathew Carthews Rep.*), although it was an outlawry which could be defeated by a writ of error. Thus, therefore, at common law, parties were suable though beyond seas.

<sup>1</sup> Ch. 44.

<sup>2</sup> *Vide ante*, c. vii.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> Ch. 45.

If the party came in at the day to save his default, he was to have the issues. If he came not, the king was to have them; that is, the justices of the king were to cause them to be delivered to the wardrobe; the justices of the bench at Westminster were to deliver them to the exchequer; the justices in eyre to the sheriff of the county.

A new time of limitation was fixed in the following manner: (a) In conveying a descent in a writ of right, it was enacted,<sup>1</sup> that none should presume to declare of the seisin of his ancestor beyond the time of King Richard; which has since been always construed to mean the first day of that king's reign. Writs of novel disseisin, and of partition, commonly called *nuper obiit*, were to have limitation from the first voyage of Henry III. into Gascony, which was in the fifth year of his reign (a period that had been fixed for assizes of novel disseisin by the statute of Merton);<sup>2</sup> writs of *mortauncestor*, of *cosinage*, of *aiel*, of entry, and *de nativis*, from the coronation of Henry III. These continued the period of limitation till the reign of Henry VIII., when the policy of measuring the time of limitation, for commencing actions, by a certain number of years, was adopted in the place of these fixed periods. The prohibition about *beaupleader*, made by the statute of Marlbridge,<sup>3</sup> was revived and enforced.<sup>4</sup>

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(a) In the time of Bracton, *temp.* Henry III., the period of limitation was fixed upon the natural and practical basis of the range of recollection in the jurors or witnesses, who could only testify as to what they had seen or heard from persons who had personal knowledge, and thus, of necessity, there was practically a period of limitation, which was estimated at about forty years, that is, forty years from the time of the matter in question, which probably might be prolonged to sixty years, as society became more settled, and possibly it might be supposed that there was some uncertainty in the duration of the period of limitation upon this principle, which, however, has this advantage, that it was reckoned from the time of the matter in question. In the statute of Merton, A. D. 1236, a certain date was fixed as the commencement of the period of limitation, viz., the coronation of Henry II., which was eighty years back. In 1275, that period having by the lapse of time increased to a hundred and twenty years, the coronation of Richard I., which was sixty-eight years before, was fixed as the date whence the period should be reckoned. The absurdity of such arbitrary modes of reckoning the period of limitation will be manifest; but it was not until 1540, *temp.* Henry VIII., that the rational mode of limitation was restored; that is to say, a limitation reckoned from the occurrence of the matter.

<sup>1</sup> Ch. 39.

<sup>2</sup> For the limitations fixed by the statute of Merton, *vide ante*, 59. For the limitation of the seisin in a writ of right, *vide ibid.*, 427.

<sup>3</sup> *Vide ante*, c. viii.

<sup>4</sup> Ch. 8.

While these improvements were made in the practice of our civil courts, the legislature provided for the due administration of the criminal law, by defining crimes, but more particularly by contriving modes of prevention and punishment.

It should seem that sheriffs, in their tourns, and lords in their leets, had exercised that part of their criminal jurisdiction which related to escapes with too little discretion; for it was enacted,<sup>1</sup> that nothing be demanded, taken, or levied by the sheriff, or by any other, for the escape of a thief or felon, until it be judged an escape by the justices in eyre.

The crime of rape, which, in ancient times, had been felony, and punishable with death, had, in the last reign, been considered in a less heinous light, and punished only by certain mutilations, which were thought peculiarly adapted to the offence.<sup>2</sup> This species of punishment continued till the legislature once more changed it. The king, says the statute,<sup>3</sup> prohibiteth that none do ravish, nor take away by force, any maiden within age, neither with nor without her consent; nor any wife or maiden of full age (that is, twelve years old, being the age of consent), nor any other woman against her will: and if any do, the king shall do common right, at his suit that will sue within forty days; and those who are found guilty shall be punished with two years' imprisonment, and fine at the king's pleasure. If they have not whereof to make fine, the imprisonment shall be increased in proportion to the enormity of the trespass. We shall presently<sup>4</sup> see that this new penalty was changed by parliament to the old one of felony.

Trespases<sup>5</sup> in parks and ponds (*a*), which were thought not sufficiently punished by a compensation in damages

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(*a*) Upon this it was held that the statute Westm. 1, c. xx., *De malefactoribus imparcis et vivariis*, did not extend to forests *ne extendia*, al forest *quod nota* (10 *Edward IV.*, 7). This was in accordance with a general principle always recognized in the construction of statutes, viz., that penal laws were to be construed strictly (11 *Hen. IV.*, 76); whereas beneficial acts were always construed largely and liberally. Statutes which restrained the common law, again, were construed strictly (18 *Edward IV.*, 16).

<sup>1</sup> Ch. 3.

<sup>2</sup> *Vide ante*, c. viii.

<sup>3</sup> Ch. 13.

<sup>4</sup> *Vide post*, Stat. Westminster 2, c. 34.

<sup>5</sup> *Vide ante*, c. viii., where the great lords wanted authority to punish such trespassers with a short hand; but the king refused to concur in a statute for that purpose.

only, were to be punished by imprisonment and fine at the king's suit,<sup>1</sup> and, says the statute, if tame beasts or other thing in the park were taken in the way of robbery, the common law shall be executed upon the offender, as upon one who had committed open theft and robbery.

Several laws were made to guard against the misconduct and extortion of officers of courts, who, from their situation, were enabled to throw obstacles in the way of justice, and so confer favors, or work oppression, to answer their private views. A short mention of these provisions may not be unentertaining, as they tend to show the difficulty under which the administration of justice labored at that time.

We have before taken notice of a remedy contrived for those who were disseized by escheators, sheriffs, and bailiffs, *colore officii*.<sup>2</sup> It was now ordained, that no officers of the king, either by themselves or any other, should *maintain* suits or matters depending in court, *to have a part* or profit out of the thing in question, according to an agreement made between them, under penalty of being punished at the king's pleasure.<sup>3</sup> No sheriff, or other officer, was to take any reward for doing his office, but was to be content with the king's pay, under the penalty of forfeiting double the sum taken, and being likewise punished at the king's pleasure.<sup>4</sup> One article of expense to the subject in the circuits was, delivering out the *capitula coronæ*; which, it was ordained,<sup>5</sup> should, for the future, be the privilege of the justices' clerks only; and they were not to take more than two shillings of every hundred or town out of which a jury of twelve or six appeared, who were each to have a duplicate of the *capitula*. Prior to this statute, probably, not only the clerks of the justices, but of escheators and other ministers and officers that followed the eyre, used to write out these *capitula*; and, most likely, reduced the value of a perquisite which, it was thought, should belong to the clerks of the justices.<sup>6</sup> If a justice's clerk exceeded the sum here allowed, or any one else took upon him to make out the *capitula*, he was to pay thrice as much as he received, and lose his office for a year. It was also ordained<sup>7</sup> that no clerk of the king, nor of any justice,

Extortion of  
officers.

<sup>1</sup> Ch. 20.

<sup>3</sup> Ch. 25.

<sup>5</sup> Ch. 27.

<sup>7</sup> Ch. 28.

<sup>2</sup> *Vide ante*, c. viii.

<sup>4</sup> Ch. 26.

<sup>6</sup> 2 Inst., 211.

should accept of a presentation to a church concerning which any plea was then depending in the king's court, without special license from the king, under pain of the church being declared void, and of losing his office. At this time many ecclesiastical persons were not only clerks in the chancery, and other of the king's courts, but also stewards of the household to noblemen and other great men, and were therefore in situations to procure favor or discouragement in suits.<sup>1</sup> It was further ordained, that no clerk of any justice or sheriff should take part in matters depending in the king's courts, nor commit any fraud whereby common right might be disturbed or delayed.

There was great complaint that officers, criers, who had an inheritance in their office, and the marshals of justices in eyre, took money of such as recovered seisin of land, or other thing depending in suit; and that fines were levied of jurors, towns, prisoners, and others attached upon pleas of the crown; which abuse was in a great measure owing to the excessive number of those officers. Several penalties were enacted to punish offences and extortions of this kind.<sup>2</sup>

During the late dissolute times, malpractices seem not to have been confined to inferior offices, but to have run through all ranks of persons attendant upon courts. The following provision was occasioned, no doubt, by an experience of this kind. It was ordained,<sup>3</sup> that if any serjeant-pleader,<sup>4</sup> or other, do or consent to any manner of deceit or collusion in the king's court, in order to deceive the court or party, he shall be imprisoned for a year and a day, and shall never after be permitted to plead in that court. If the offender should not be a pleader, besides the imprisonment, he was further to be punished at the king's pleasure, according to the degree of the offence.

We have an instance where corruption and cabal had got upon the bench of justice. It has been seen, that by the statute of Merton,<sup>5</sup> every free suitor of the county and other courts might make his attorney to do suit there for him. Under color of this license, two mischiefs ensued: first, barrators and maintainers of quarrels<sup>6</sup> were encour-

<sup>1</sup> 2 Inst., 212.

<sup>2</sup> Ch. 30.

<sup>3</sup> Ch. 29.

<sup>4</sup> In the original, *Serjeant countre*.

<sup>5</sup> Viz., c. 10. *Vide ante*, 60.

<sup>6</sup> *Querrells* may signify complaints, suits.



aged by the sheriff to become attorneys, to make suit; and accordingly, amongst the other suitors, to give judgment, and sometimes, perhaps, take the lead in pronouncing judgment for, and in the name of, the other suitors: secondly, stewards of great lords, and others, who had no letters of attorney, as required by the statute, would do the like.<sup>1</sup> These were the mischiefs intended to be removed by the following law,<sup>2</sup> which ordained that no sheriff should suffer any barrators, or maintainers of suits in their county courts, nor permit either stewards of great lords, or any other (unless he was attorney for his lord), to make, give, or pronounce judgment, if he was not specially so commanded by all the suitors, and attorneys of suitors, then present in court; and should any one act otherwise, the sheriff, as well as the offender, was to be grievously punished at the pleasure of the king.

Thus far of offences against the administration of justice. There remains only one crime, which we shall first mention, before we speak of the regulations made for the improvement of criminal judicature: this is the spreading of false and slanderous reports (*a*). The cause of this act is stated in the preamble:<sup>3</sup> "Forasmuch as there have been oftentimes found in the country devisers of tales, whereby discord, or occasion of discord, hath many times arisen between the king and his people, or great men of the realm," as had been lately experienced in the unsettled reign of Henry III.; therefore it was commanded, that from henceforth no one be so hardy as to tell or publish any false news or tales, whereby discord, or occasions of discord or slander, may grow between the king and his people, or the great men of the realm; and whoever does so, shall be taken and kept in prison until he has brought into court the first author of

Spreaders of  
false reports.

(*a*) Lord Coke's comments upon this chapter are quaint and instructive. He says that persons were "the authors of great discord and scandal," sometimes between the king and his commons, and at other times between the king and his nobles, as they wrought secret discontentment that produced public discord and scandal, which did oftentimes break out (in the reign of Henry III.) into fearful and bloody wars. King Edward I., finding by experience the woeful effects of such false reports, therefore did make this law for the redress—"in a temperate manner," adds Coke, "leaving the same to the censure of the common law, by fines and imprisonments" (2 *Inst.*, xxii.). He cites both Britton (fol. 33) and Fleta (lib. 2, c. i.) to the like effect.

<sup>1</sup> 2 *Inst.*, 225.

<sup>2</sup> Ch. 33.

<sup>3</sup> Ch. 34.

the tale. This, from the nature of the thing, became the severest punishment that could well be devised, as it might amount to perpetual imprisonment.

Respecting the office of magistrates, it was provided in the following manner. First, as to coroners. It seems, that of late many mean and unfit persons had been chosen into that office, though the proper qualification for such an officer was that of *probus, legalis, et sapiens*. It was now ordained, that<sup>1</sup> sufficient men should be chosen coroners, of the most wise and discreet knights, who were best skilled and willing to attend their duty; and such should lawfully attach and present pleas of the crown. It was further directed, that sheriffs should have counter-rolls with the coroners, as well of appeals as of inquests, of attachments, or of other things which belonged to that office; and no coroner was to take any fee for doing his office. The particular duties of this important office were more particularly marked out by a subsequent<sup>2</sup> statute, of which we shall take notice in its proper place.

It had been the practice for the common fines and amercements before justices in eyre to be assessed promiscuously by the sheriff, and, as the statute says, by barrators; and upon those who were innocent, as well as upon the guilty; all which was transacted after the justices were gone. These fines were paid to the sheriff and barrators. To remedy this, it was provided,<sup>3</sup> that henceforth such sums should be assessed in the presence of the justices in eyre, before their departure, by the oaths of knights and other honest men, upon those who ought to pay; and the justices were to cause the sums to be put into *estreats*, which were to be delivered into the exchequer.

The chapter of *Magna Charta* concerning the reasonableness of amercements,<sup>4</sup> was re-enacted in more comprehensive terms; for whereas that provision says, *LIBER HOMO non amercietur, etc.*, and so was confined to natural persons, or, at furthest, to *sole* bodies politic; this statute of Edward I.<sup>5</sup> extends it to *cities, boroughs, and towns*.

Because the method of pursuing felons by fresh suit had not been so much attended to as formerly, and great ob-

<sup>1</sup> Ch. 10.

<sup>2</sup> Stat. 4 Edw. I., st. 2, *de officio coronatoris*.

<sup>3</sup> Ch. 18.

<sup>4</sup> Ch. 14. *Vide ante*, c. v.

<sup>5</sup> Ch. 6.

struction was occasioned thereto by franchises, an act was made to enforce this common law prosecution. It is directed<sup>1</sup> that all persons in general should be ready and appalled, at the command and summons of the sheriff and cry of the country, to sue and arrest felons, as well within franchises as without. Those who neglected or refused were to be fined at the king's pleasure; and if default was made by the lord of a franchise, he was to forfeit his franchise to the king; if by a bailiff, he was to be imprisoned two years. The sheriff, coroner, or bailiff who showed any favor to a felon, or concealed felonies committed within his district, was to suffer a year's imprisonment, and afterwards pay a grievous fine; or, should he not have wherewith to pay, he was to suffer imprisonment for three years.

Some laws were made for ordering of offenders when taken (a). It sometimes happened, that persons committed for murder would sue out the

Of replevying  
prisoners.

(a) Upon this Lord Coke remarks, "that it applied only to sheriffs and gaolers, and not to the king's justices or judges of any superior court;" for that, being superiors, they are not comprehended in general words; 2. That "the words *queux ont prises ou releynes prisoners*," do not include judges; 3. Because in those days prisoners were commonly bailed by the king's writ, *De homine replegiando*, and also by the writ *De odio et atid*; both of which were directed to the sheriff (2 *Inst.*, 186). And here it is proved, that it is an offence as well to bail a man not bailable, as to deny a man bail that ought to be bailed. And the reason is yielded wherefore the sheriffs and others did so offend, because they would make gain of the one and grieve the other, viz., either for avarice or malice (*Ibid.*). The mischief of the law, Coke says, it was not clear on what charges prisoners were or were not irreplevisable or bailable; and this act says, that those who are taken for homicide did not be so: "Forpris ceux queux fuerunt prises pur mort d'homme." According to Glanville: "In omnibus autem placitis de feloniam solet accusatus per plegios dimitti, præterquam implacito de homicidio, ubi aliter statutum est" (*Glanv.*, lib. xiv., c. 1; *Bracton*, lib. iii., fol. 123; *Britton*, fol. 73; *Fleta*, lib. ii., c. 2).

It is very observable that another exception is added — of persons committed by command of the king or his justices: "*Ou per commandment le roi ou de les justices*," upon which, in favor of liberty and law, the judges put a remarkable judicial construction, making it read thus: "By the command of the king, *that is*, of his justices." Coke says, "The opinion of Gascoyne, chief-justice, is notable on this point, that the king hath committed all his power judicial to divers courts; and because some, as the king's bench, are *coram rege*, and others *coram justiciariis*, therefore the act says, '*per commandment de le roi, ou de ses justices*' (2 *Inst.*, 186). But this is sophistical; for it had been held long before, that a matter before the king's justices is before the king, in contemplation of law; and though the argument might be applicable to judicial acts, it is not so of acts *not* judicial. There are cases

<sup>1</sup> Ch. 9.

writ *de odio et atia*, and, obtaining a favorable inquest before the sheriff, would get themselves replevied till the

in which the king may arrest without judicial warrant, as in cases of treason or sedition; in which, though his ministers might sign the warrant, and be responsible to parliament, the warrant would be legal, and the act be in law the act of the king or the crown. The judges were very jealous of the royal power; but their reasoning was not always good. Thus, Lord Coke quotes Hussey, chief-justice, as reporting (*Year-Book*, 1 Hen. VII., 4), that Sir John Markham said to King Edward I. that the king could not arrest any man for suspicion of treason or felony, as any of his subjects might; because, if the king did wrong, the party could not have his action; which, if meant of a personal arrest by the king's own hands, was a case not often likely to occur; but *qui facit per alium facit per se*, and an arrest by order of the king, would be an arrest by the king; and the judge goes on, according to the report, to say: "If the king command me to arrest a man, and accordingly I do it, he shall have his action of false imprisonment against me," that is, presuming the king had no good cause of arrest, as he might have; and in such a case the arrest by his order would be an arrest by himself, and would be perfectly legal. And indeed a case occurred in this reign which illustrated this in a remarkable manner, and shows that an arrest by the king's own hand might be legal. There was, it is well known, an attempt to assassinate Edward I. when alone, who, however, overpowered the assassin, and held him until attendants came, when he delivered the man into their custody; an arrest of which no one will doubt the legality. Nor could it be any less clear if the king, observing the weapon, had seized the man upon suspicion, and arrested him, or ordered him to be arrested, for treason. Lord Coke indeed says, that on the statute 1 Rich. II., c. xii., "*si non que il soit per briefe, ou autre commandment de le roi*," it was resolved by all the judges that the king cannot do it but by writ, or by order or rule of some of his courts of justice where the cause dependeth, according to law; but this evidently is intended of arrests in the ordinary course of justice, which, no doubt, can only be by order of judges or courts of law. There can be no doubt, however, that there always was in the crown a power of arrest for sedition or on suspicion of treason, on the ground of danger to the state; and this power was recognized by the courts after the Revolution. But in ordinary cases the ordinary course must be pursued. Another exception to the statute was of those who were taken in the act. *Ceux queux sont prises sur le manier*, and who were not to be bailed; for, says Coke, in such case *non stat indifferenter*, whether he be guilty or not: being taken with the manner, that is, with the thing stolen, as it were, in his hand, which Bracton and Britton call *factum manifestum* (*Bracton*, lib. iii., fol. 12; *Britton*, fol. 22); and so felons, openly known and notorious, were not bailable, *larons apertement escries et notories*, nor those accused of arson or treason. These were not to be bailed or replevied by the sheriff by the common writ, *i. e.*, the sheriffs, says Coke, were not to replevy them by the common writ *de homine replegiando*, nor without writ, *i. e.*, *ex officio*: but, he adds, all or any of these may be bailed in the king's bench (2 *Inst.*, 189). This statute, as he had already pointed out, only applying to sheriffs, not the king's judges, who were presumed to have a sufficient discretion. In other cases the sheriff might release upon sufficient sureties; and if he did not do so, the prisoner might have the writ *De manucapione*; but this was taken away by the statute 28 Edward III. The statute, it is to be observed, only applied to indictments taken before the sheriff in his tourn; for other prisoners could not be bailed without writ; and the statute 2 Edward IV., c. ii., provided that upon all presentments or indictments taken before the sheriff, he should have no power to arrest or

coming of the justices in eyre. To prevent unfair inquisitions in these cases, it was ordained<sup>1</sup> that such inquests should be taken by lawful men, chosen by oath (of whom two, at least, were to be knights), who had no affinity with the prisoner, nor were for any other reason to be suspected.

But in this article of replevying offenders, suspicion of favor and malice went further than the jurors; for it is stated, in a statute which we are now going to mention, "that sheriffs and others who had the custody and imprisonment of persons<sup>2</sup> charged with felony, used to let out such as were not properly replevisable, and kept in prison such as were, that they might gain of the one party and grieve the other." For this reason, and because it had not been hitherto particularly determined who were replevisable and who not, except in the case of persons taken for the death of a man, or by command of the king, or of his justices, or for the forest, it was therefore expressly enacted<sup>3</sup> what offenders should and what should not be replevisable. First, the following persons were in no wise to be replevisable,—neither by the common writ, that is, the writ *de homine replegiando*, nor without writ, that is, *ex officio*, by the general discretion entrusted to sheriffs in this point,—namely, persons outlawed, those who had abjured the realm, provors, those taken with the manor, those who had broken the king's prison, thieves openly defamed and known, such as were appealed by provors, so long as the provors were living (if they were not of good name); such as were taken for house-burning, feloniously done, or for false money, or for counterfeiting the king's seal; persons excommunicated, who were taken at the request of the bishop; those taken for manifest offences, or for treason touching the king's person. The following persons might be let out by sufficient surety; but the sheriff was to take nothing for so doing, and was to be answerable for them—namely, those indicted of larceny by inquests before sheriffs and bailiffs by their

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put in prison any person so prescribed or indicted, but should send the indictments to the sessions of the justices of the peace. These justices of the peace practically superseded the criminal jurisdiction of the sheriffs; and the present statute is only valuable for the principles it lays down; and for this reason Coke expounds it fully with reference to the act 1 and 2 Philip and Mary, as to bail. There was a statute of Henry VI. as to bail in civil cases, as to which, *vide post*.

<sup>1</sup> Ch. 11. *Vide ante*, c. viii.    <sup>2</sup> *Rettez de felonie*.    <sup>3</sup> Ch. 15. *Vide ante*.

office; those of light suspicion; those taken for petty larceny that amounted not to more than 12d.,<sup>1</sup> if they were not guilty of some other larceny before; those guilty of receipt of felons, or of commandment, or force, or of aid in felony done; those guilty of some trespass for which a man ought not to lose his life or limb; a man appealed by a provor, after the death of the provor, if he be no common thief, nor defamed.

If the sheriff, or any other person who had the keeping of prisons, let a person to bail who was not replevisable, he was to lose his office forever, though he held it in fee; and should it be any inferior officer who had done so without the will of his lord, he was to suffer three years' imprisonment, and to be fined at the king's pleasure. Again, if any detained a prisoner who was replevisable, after he had offered sufficient surety, he was to suffer a grievous amercement to the king; but if he took any reward for delivering such a prisoner, he was to pay double the sum to him, and be at the king's mercy.

In this manner was the law of bail in criminal cases settled in the reign of Edward the First. The same statute has been adopted in later times, as<sup>2</sup> the rule by which justices of the peace were to govern themselves.

Having spoken of such laws as were made to bring offenders to justice, it follows that we should treat of such as directed the manner of administering it. It had been the usage (contrary to the general law) in some counties to outlaw persons appealed<sup>3</sup> of command, force, aid, or receipt, before the person who was appealed of the principal fact was outlawed. To render the law uniform in this point, it was ordained<sup>4</sup> that none should be appealed of command, force, aid, or receipt, until the person appealed of the fact was attainted; nevertheless, the appellant was not therefore to delay commencing his appeal at the next county against the accessory any more than against the principal; only the exigent against him was to remain till the principal was attainted of the fact by outlawry, or otherwise. This statute, though it speaks

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<sup>1</sup> The distinction between greater and smaller thefts is mentioned only obscurely by Bracton. This is the first passage where the limit of petty larceny is distinctly marked. *Vide ante*, c. viii.

<sup>2</sup> By stat. 1 and 2 Ph. and M., and 2 and 3 Ph. and M.

<sup>3</sup> *Vide ante*, 282.

<sup>4</sup> Ch. 14.

of appeals only, has been construed to extend to indictments.

This account of the alterations made in our criminal law shall be closed with the two following statutes—one relating to the exemption claimed by the clergy, the other concerning a very singular part of our penal code, called *peine forte et dure*.

We have seen that the clergy had so far established the exemption of their persons from corporal pains  
(a), as for it to be laid down for law in the

Of clergy.

(a) This mode of expression seems to represent the clergy as usurping all these privileges or immunities, and as constantly encroaching on the state, whereas it will have been seen from the laws of the Saxons, these privileges and immunities were all established in that age. Thus in the *Mirror* we find that Alfred hanged a judge who had executed a clerk, because as a secular judge he must have known he had no jurisdiction over clerks (*Mirror*, c. v.). And the laws of Canute show that such was the law in the Saxon times. The reason for it is obvious, that the barbarous ordeal was the mode of trial resorted to in that age in criminal cases; and the Church, as Hale says, did all it could to discourage it, and as one mode of doing so, prohibited it as to the clergy, who were supposed to be specially under its charge; and as to the clergy, therefore, the Church adopted the more sensible system of compurgators, who were a species of witnesses or jurors, whose verdict, as Lord Coke says, countervailed or was equal to a verdict of jurors, the only difference being that jurors were sworn *between* the crown and the party, and compurgators were produced by the party, both being equally sworn of their own knowledge or belief, jurors in that age being witnesses. This was, it is obvious, a more rational mode of trial than the ordeal, and was the origin of trial by jury. And by degrees, and by the example of this more rational system of trial for the clergy, it became adopted by the laity. As Lord Hale observes, by the persuasions of the clergy the ordeal became discontinued in favor of the more rational system. It was not likely, therefore, that the bishops (who could hardly have an interest in the immorality of their clergy) should fail to apply the system which the canon law itself enjoined. But then the effect of withdrawing the accused before trial was that the king lost the benefit of the forfeiture of lands and goods, which followed upon conviction; and there is too much reason to believe, from the character of the judges in those days, that this often supplied a motive to them for pressing cases to conviction. At all events, it supplied an obvious motive for some legislation, which should afford a pretext to the king's judges for trying the accused clerk before he was delivered to the bishop. This could not be done in any open or direct way, for beyond all doubt it would have been a total alteration of the law. This is clear from Bracton, who had lately laid the law down thus: "Cum vero clericus captus fuerit, pro alio crimine, et imprisonatus est, et de eo petatur curia Christianitatis, ab ordinario . . . imprisonatus ille statim ei deliberetur, sine aliqua inquisitione facienda" (Bracton, fol. 123). The statute itself indeed recites the law to the like effect, and then proceeds merely to enact that the clerks should not be released by the bishops until they had undergone their canonical purgation. There is not the slightest reason to suppose that they were so; and therefore the real reason for the enactment must be sought in the use made of it by the king's judges, which was upon some strained and monstrous misconstruction.

last reign that a clerk, taken for the death of a man, or any other crime, and imprisoned, if demanded by the ordinary to be delivered over to the court Christian, should immediately be delivered, without any inquisition being taken.<sup>1</sup> The pretence of the ecclesiastical court was, that the clerk so delivered should be put to make canonical<sup>2</sup> purgation, and to establish his innocence, or stand convicted of the charge. Whether this was constantly or fairly practised seemed to be a matter of some doubt.

We shall now hear what was ordained by parliament on this point (*a*). It was provided<sup>3</sup> that when a clerk was *taken on a charge of felony*,<sup>4</sup> and was demanded by the ordinary, he should be delivered to him, according to the privilege of holy church, on such peril as usually belonged to it (by which probably purgation is meant), after the custom used in former times; and the king now admonished and enjoined the prelates, upon the faith they owed him, and for the common profit and peace of the realm, that those who had been indicted of such offences by a solemn inquest of good and lawful men in the king's court (*b*), *should in no manner be delivered without due purga-*

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tion of it, to pretend that it gave them power to try the clerk first, before he was delivered, the effect of which would be that if he should be convicted, his lands and goods would be forfeited to the crown. This, it is plain, was the real motive for the statute, and the "pretence" was on the part of the crown lawyers who thus contrived it.

(*a*) It is to be observed that the author here represents it as "provided" by the statute, so as to keep up the impression he had already conveyed that this was a novel claim, or an encroachment on the part of the clergy, whereas, as already shown, it was as old as the Saxon laws, and had been laid down by Bracton in the previous reign as settled law, and was not merely "provided" but recognized and recited by the act. The real reason of the enactment was at the end; and the pretence it afforded to the crown lawyers and the servile judges of the king to warp, wrest, and alter the law.

(*b*) As already seen, the effect of the law was that the clerk was to be delivered to the bishop *before* trial, in order that, *instead* of undergoing trial at common law, he might be put to his "canonical purgation;" and this is recognized by the act, which says that the clerk shall not be liberated until he has undergone such purgation, "*Que ceux qui sont endites, etc., en nul maner, ne les deliverent, sans due purgation, issint que le roy nilent mestier de mitter auter remedy.*" Upon this, however, it was actually held by the king's judges that they had power to *try the clerk before he was delivered to the ordinary!* And the king's own law writer, Britton, accordingly thus laid the

<sup>1</sup> *Vide ante*, c. viii.

<sup>2</sup> Canonical purgation was that by compurgators, and had been recommended by the canons in lieu of that by ordeal, which, in the canon law, was called vulgar purgation.

<sup>3</sup> Ch. 2.

<sup>4</sup> *Est pris pur rei de felonie.*



tion, so that the king might have no need to provide any otherwise in this matter.

We now come to the statute which makes the first mention of anything like what has since been called the *peine forte et dure*; a punishment to be inflicted on such as refused to put themselves on a jury, to be tried for the felony of which they were indicted. The statute ordains,<sup>1</sup> "that notorious felons, and who are openly of evil name, and will not put themselves on inquests of felonies with which they may be charged before the justices at the king's suit, *soient mys en la prisone forte et dure*, shall have strong and hard imprisonment, *come ceux qui refusent etre a la commune ley de la terre*, as those who refuse to stand to the common law of the land. But this is not to be understood of such prisoners as are taken upon light suspicion" (a). Great difference of opinion has arisen upon this provision. Some have thought that the punishment of *peine forte et dure* was ordained first by this act, and that at the common law, a felon standing mute should, upon a *nihil dicit*, be hanged, as the law is at this day in case of treason. Others have holden, that at the common law, in favor of life, he should neither have *peine forte et dure*, nor have judgment to be hanged, but be remanded to prison until he would answer. Lord Coke is of opinion that the *peine forte et dure* was a penalty at common law, and not such a one as any judges could have framed upon a general direction of

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law down on the subject, writing soon after the statute, "Si clerk encopie (*i. e.*, indicté) de felony, allege clergie, et est trove (*i. e.*, que est un clerk), et l'ordinary demaund, donque serra enquisse comment il est mescrue (*i. e.*, culpable), et s'il soit merit mescrue, donques il serra aroge tous quits (*i. e.*, he shall go quit), et s'il soit mescrue si soient ses chateux, taxes, et ses terres prises en nostre mesne, et son corps deliver al ordinary" (*Britton*, c. iv., fol. 11). That is to say, that upon conviction of the clerk his lands and goods should be forfeited to the crown, and then he should be delivered to the ordinary, which supplies the real motive for this piece of legislation.

(a) The author of the *Mirror* observes upon this that it is reprobable to put persons found guilty of felony, who will not put themselves upon their country, to penance, which may kill them, without regard to their condition, since one may perhaps help and acquit himself otherwise than by his country; and as none is to be put to penance before he is attainted of the offence for which he ought to be pained (c. v., s. 4). This seems to assume that in some way the parties were found guilty of the felony, before being put to the penance. Possibly it may mean the finding of the grand jury. The latter part of the passage appears to confirm the author's view.

<sup>1</sup> Ch. 12.

this act, which only says they are to be sent to *prisonne forte et dure*; and that the words of this act were designed to refer to a subsisting species of penance, which they sufficiently intimated, though the particular mode of it was not described.<sup>1</sup>

This provision is worthy of serious consideration. The statute says, that *those who will not put themselves on inquest of felonies*,<sup>2</sup> shall be treated *as those who refuse to stand to the common law of the land*.<sup>3</sup> The difference between these two kinds of refusal is a difficulty that stands as much in need of explanation as the manner in which the latter were punished.

Though this statute, from the form of its expression, does not seem to have introduced this penance, but rather speaks of it as a thing already known; yet it does not appear that it is taken notice of in any ancient writer, record, or case, before the reign of this king. On the contrary, some instances are to be found in the preceding reign of persons arraigned for felony standing mute, who were, nevertheless, not put to their penance, but had judgment to be hanged. The practice in 5 Hen. III. was, it should seem, of the following kind: If a prisoner stood wilfully mute, a jury of twelve men was impanelled. If they found him guilty, another jury of twenty-four was chosen to examine the verdict of the former; and if they were of the same opinion, the sentence was for the prisoner to be hanged.<sup>4</sup> It is true, there is no mention of such proceeding in Bracton; nor does that author at all acquaint us with the method of treating persons who obstinately refused to submit to a fair trial.<sup>5</sup>

It should seem, then, that this method of treating felons who stood mute, was introduced some time between the 5 Hen. III. (or even the time of Bracton) and the 3 Edw. I., and was not established by this act. That it was supported by some other sanction than this act, is plain from the constant practice, which has allowed this penance to hold in cases of appeal, though the act only speaks of the king's suit: and those authors who wrote nearest the time of

<sup>1</sup> 2 Inst., 178, 179.

<sup>2</sup> *Ne se voient mettre en enqueste des felonies.*

<sup>3</sup> *Come ceux qui refusent etre a la commune ley de la terre.*

<sup>4</sup> This appears by two curious records in the notes upon Hale's P. C., vol. ii., 322.

<sup>5</sup> *Vide ante*, c. viii.

which we are now speaking, such as Fleta, Britton, and the *Mirror*, mention the penance without referring to this statute.

The manner in which this penance is described by Britton is as follows: "If they will not put themselves upon the country, let them be put to their penance<sup>1</sup> until they pray to do it; and let their penance be this: that they be barefooted, ungirded, and bareheaded, in their coat only,<sup>2</sup> in prison upon the bare ground, continually, night and day; that they eat only bread made of barley and bran; that they drink not the day they eat, nor eat the day they drink; nor drink anything but water the day they do not eat; and that they be fastened down with irons."<sup>3</sup> In Fleta it is stated in a similar way: *Morti tamen non condemnabitur, sed gaolæ committetur sub diætâ salvo custodiendus, donec instructus petat inde se legitimè acquietare; considerato verò erit talis, quòd unico indumento indutus, et discalceatus, in nudâ terrâ, quadrantalem panem hordeaceum tantùm pro duobus diebus habeat ad victum, non tamen quòd quolibet die comedat, sed altero tantùm; nec quòd singulis diebus bibat, sed die quo non comederit, aquam bibat tantùm, et hæc diætâ omnibus LEGEM REFUTANTIBUS injungatur donec petant quod prius contempserint.*<sup>4</sup>

The penance stated by these two authors is a rigorous method of compelling the criminal to undergo a trial; yet very different from the cruel way in which felons standing mute were treated in aftertimes. The alterations this penance received, and the causes that led to such alterations, will be considered in their proper place.

If a conjecture may be hazarded upon a point that has created much debate, perhaps this statute may be considered as auxiliary towards the establishment of trials by jury, in preference to all others then in use. It may be remembered that *Magna Charta*,<sup>5</sup> in declaring the privilege every man shall have of being fairly tried, mentions two modes; that *per judicium parium suorum*, and that *per legem terræ*; there being methods of trial much more ancient, as we have before seen, than that by jury;<sup>6</sup> and such as therefore might more properly be called the *lex terræ*, than the later invention of trial *per pares*. It is remarkable that Fleta uses the like expression in this sense. After reciting at length

<sup>1</sup> *Si soient mys a lour penance.*

<sup>2</sup> *En pour lour cote.*

<sup>3</sup> Britton, c. iv., fol. 11.

<sup>4</sup> Flet., lib. i., c. xxix., s. 33.

<sup>5</sup> Viz., c. xxix. *Vide ante*, c. v.

<sup>6</sup> *Vide* vol. i., 456, 457; *ante*, 167.

the judgment of penance; he adds, this is the course *omnibus LEGEM refutantibus*, with all those who refuse to be at the law, or common law; and the particular case he there states as an instance in which that judgment should be passed, is of a criminal, who having said that he would defend himself *per corpus vel per patriam*, as the court should award, would not, as he ought by law to do, make a specific declaration *by which* of those modes he would be tried. This was therefore to be considered as putting himself upon *no trial at all*, which was totally renouncing the decision of the law; and consequently, by the old course recognized in this statute, he was to be sentenced to the penance.

To apply this to the statute before us. The trial by inquest had of late been encouraged, as we have seen in the last reign, and was in more esteem than the barbarous practice of the old jurisprudence; nor was there any object of judicial improvement that more deserved the countenance of a wise legislator than this mode of inquiry. We have seen that Bracton, in his account of the proceeding *per famam patriæ*,<sup>1</sup> says, that a person so indicted might make his purgation, or put himself upon the country. It does not appear from that passage, nor from any other part of that author, whether *the country* there meant was the same which had indicted him, or some other: though it should rather seem, from the whole of his discourse on this subject, that a person indicted was to stand or fall by the verdict of that single jury, unless he made his purgation. However, it should seem, that it was intended by the present statute to make an alteration in this point; and that as a person appealed might put himself upon the country to prove his innocence, so one indicted should no longer make purgation, but should be *compelled* to put himself on an inquest of the country, to try the truth of the charge brought against him by the indictors.

If the statute is read with these sentiments, and a knowledge of these circumstances of the then state of criminal judicature, it will receive a new light, and appear in a point of view in which it never was before seen. It will then very plainly ordain, that persons charged or indicted of crimes who will not put themselves on *inquests* (that is,

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<sup>1</sup> *Vide ante*, 293.

on the particular mode of trial which it is seen fit to encourage, as the more rational), shall be sent to prison, and treated with the same severity as those who refuse to put themselves on the old method of inquiry, long used by the law of the land. The statute certainly reads as intelligibly in this way as in any other, and perhaps more so; and whether this sense of it is not strengthened by the ensuing history of the trial by jury, will be for the reader to judge. One of the most remarkable changes in that proceeding, during this reign, was the invariable resort to a jury to try the indictment, and *deliver* the prisoner of the charge thereby brought against him.

Before we dismiss the statute of Westminster the first, the last chapter but one<sup>1</sup> deserves a slight notice, as it discovers the caution observed in everything that concerned the rights of the crown, both in private instruments and acts of the legislature. "Forasmuch," says that act, "as the king hath ordained all these things to the honor of God and holy church, and for the commonwealth, and for the remedy of such as be grieved," as he had condescended so far for the national benefit, "he would not that, at any other time, it should turn in prejudice to himself or his crown; but that such right as appertained to him should be saved in all points." As the reader goes through the statutes of this reign, he will find many reservations of the king's right even more singular and emphatical than this.

The next statute in this reign is 4 Edw. I., st. 1, and is entitled, *Extenta Manerii*; being a sort of direction for making a survey, or terrier, of a manor and all its appendages. This is followed by the The office of coroners. stat. *de Officio Coronatoris*, enumerating the duties of that office more particularly than they had been stated even by Bracton (*a*).<sup>2</sup> It is directed by this statute, that the coroner should go, upon the information of bailiffs, or other honest men of the country, to the places where any were killed, or suddenly dead, or wounded; where houses were broken, or where treasure was found; and should

(a) In Britton the office of coroner is described very fully. The chapter proceeds very much in the terms of the present statute, and thus affords a curious proof that the treatise of Britton, which was written after the statute of Westminster, was in part composed of the statutes.

<sup>1</sup> Ch. 50.

<sup>2</sup> *Vide ante*, c. viii.

forthwith command four, five, or six assessors of the next towns to appear before him in such a place; and there he was to inquire, upon their oaths, whether they knew where the person was killed, whether in a house, bed, tavern, or in company, and who that company were. He was to inquire who were the principals and accessories; who were present, whether men or women, and of what age. Those that were found guilty by the inquisition in this manner, were to be taken and delivered to the sheriff, and committed to gaol; and those who were discovered, but were not found guilty, were to be attached; that is, were to give pledges to appear at the next coming of the justices, and their names were to be written in rolls. The coroner was to go immediately to the house of the person found guilty of the murder, and inquire what goods he had, and what corn in his granary; and, if he was a freeman, what land he had, and the value of it yearly; and was to cause the land, corn, and goods to be valued, as if for sale, and to be delivered to the township, which was to be answerable for them before the justices; the land was to remain in the king's hands, till the lords of the fee had made fine for it. After all this ceremony, the dead body was to be buried, and not before. In like manner, inquiry was to be made, when any one was drowned, or suddenly dead, whether any hurt was visible on the body or not; and should it appear they were not killed, yet the coroner was to attach the finders, and all those in the same company.

Beside this inquiry *super visum corporis*, there were other articles which fell under the jurisdiction of the coroner. He was to inquire of *treasure trove*; who was the finder, or suspected thereof; and he was to attach him by four, six, or more pledges. He was to attach persons appealed of rape, and of wounds, especially if the wounds were mortal; and the party offending was to be safely kept till it was perfectly known whether the person wounded could recover. If the person recovered, then he need only attach the offender by four or six pledges, according to the size of the wound; if it was for a maim, by not less than four; for a small wound, two would suffice. All these proceedings were to be enrolled in the roll of the coroner. Accessories were to be taken and kept till the principals were attainted or delivered. *Deo-*

*dands*<sup>1</sup> were to be valued and delivered to the towns under the direction of the coroners, as was also wreck of the sea, and those that laid hands on it were to be attached: those who did not follow the *hutesium*, or hue and cry, were to be attached. All these objects of police had been, by the old law, intrusted to the coroners, whose office was of great consideration and utility in the preservation of the peace and the prosecution of offenders.

The statute of *bigamy*, called so from a provision made respecting *bigami*,<sup>2</sup> was passed the same year with the former.<sup>3</sup> The general preamble to this short statute (for it contains only six chapters) is very remarkable, and well deserving of notice, as it gives some intimation of the course then pursued in passing laws. It states, that "in the presence of certain reverend fathers, bishops of England, and others of the council of the realm of England,"<sup>4</sup> the underwritten constitutions were recited; and afterwards they were heard and published before the king and his council,<sup>5</sup> who all agreed, as well the justices as others, that they should be put into writing for a perpetual memorial, and that they should be strictly observed.<sup>6</sup>

From this recital prefixed to the statute of bigamy, it appears that the statute was digested and framed by a sort of committee of parliament, but that it was the approbation of the king's council, among whom were the justices that determined the king in making it public, and that it was from the concurrence of these two bodies, and not that of the parliament, that it derived its sanction and authority. It was for this reason that Shard, in the time of Edward III.,<sup>7</sup> was of opinion that this was no act of parliament; however, it has always been received as one. It seems to be a declaration of some points of the common law, which was thenceforward to govern the judges in their decisions.

The first chapter is penned expressly with that view. "It was agreed," says the statute,<sup>8</sup> "by the justices and other learned men of our lord the king's council, who

<sup>1</sup> Such casualties are called *Bani* in this statute.

<sup>2</sup> Ch. 5.

<sup>3</sup> Stat. 4 Edw. I., st. 3.

<sup>4</sup> *De concilio regni Angliæ.*

<sup>5</sup> *Coram rege, et concilio suo.*

<sup>6</sup> See Pickering's *Statutes from the Cott. MS.*, where the wording differs from that in some editions of the statutes, as may be seen by comparing it with 2 Inst., 287.

<sup>7</sup> 2 Inst., 267.

<sup>8</sup> Ch. 1.

heretofore have had the use and practice of judgments," that whereas, in case of a deed and feoffment made by the king, so conceived as that a common person would thereby be bound to warranty, it had been held that the justices could not make an award of recovery over against the king, they had done right in so judging, and the law was so. In the second chapter,<sup>1</sup> a like provision was made respecting *aid prier*, which was the name now given to the course mentioned by Bracton as a substitute for vouching where the king was warrantor.<sup>2</sup> This was to relieve the king from *aid prier*, where there was no express warranty, or in case of a release or confirmation, where the king granted only as much as in him lay, and the like. Another provision was made about *aid prier* of the king by chapter III. However, as this statute did not get into print till the latter part of the reign of Henry VIII., and, as it should seem, was not commonly known before, *aid prier* had often been granted in opposition to the directions here laid down.

By the fourth chapter,<sup>3</sup> it was agreed that a regulation which, it seems, had been made in the reign of Henry III. about purprestures and encroachments on the king, and which has not come down to us, should be observed (*a*). This ordained that the king should have power to resume into his own hands all such encroachments, whether of franchises or other things.

Then follows the provision which gave the name to this statute<sup>4</sup> concerning men twice married, who were called in the canon law *bigami*. (*b*) These, by a late canonical con-

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(*a*) The subject of "purpresture" is very fully treated of by Britton (as also that of "franchises") under the head of "*Droits del Roy*," always with a careful view to the interests of the crown, and especially as to the emoluments it derived from fines or forfeitures for purprestures, or any encroachments on the royal rights. Inquiry is to be made, "*De toutes maneres de purprestures, faites sur nous, de terres et de franchises*," *i. e.*, all kinds of encroachments on our lands and franchises (*Britton*, fol. 28, "*Droit del Roy*"). And this is more fully expounded under the two subsequent heads of "Franchises" (fol. 30), and "*De Plusurs Torts*" (fol. 31). It is laid down, that as to purprestures, nuisances should be redressed at the cost of the purprestors (fol. 30). Lord Coke derives purpresture from the French *pourpris*.

(*b*) It was a papal constitution which is here alluded to, and was in effect enacted by this chapter. The chapter runs thus: "*De Bigamis quos Dominus Papa in Concilio Lugdunensi, omni privilegio clericali privavit, per constitutionem, etc., inde editam*," etc., upon which Lord Coke's commentary is: "Bigamus is he that either hath married two or more wives, or that hath

<sup>1</sup> Ch. 2.

<sup>2</sup> *Vide ante*, 221.

<sup>3</sup> Ch. 4.

<sup>4</sup> Ch. 5.



stitution,<sup>1</sup> had been excluded from all the privileges of clerks. However, certain bishops, still grudging that the lay tribunal should gain the advantage which was lost by any individuals of the clergy, had claimed many clerks indicted of felony, notwithstanding they had become *bigami*, alleging that they had married a second time before the constitution, and therefore, as they said, were not within the meaning of it. As this was an opinion that seemed to have some legal reasoning in its favor, it was necessary to declare by this statute that neither those who were *bigami* before the constitution, nor those who had become so since, should be delivered to the ordinary, but that justice should be executed upon them as upon lay persons.

The remainder of this act relates to the force and effect of certain words in a deed. It says,<sup>2</sup> that deeds which contained the words *dedi et concessi tale tenementum*, without reserving homage, or without a clause containing warranty, and to be holden of the donors and their heirs by a certain service, should be so construed as that the donors and their heirs should be bound to warranty. This seems to be only a confirmation of the common law, as laid down by Bracton.<sup>3</sup> Where a deed contained the words *dedi et concessi, etc.*, to be holden of the chief lords of the fee, or of any other, and not of the feoffor or his heirs, reserving no service, without homage, or without the above-mentioned clause, it was declared that the heirs should not be bound to warranty, notwithstanding the feoffor, during his life, should be bound by force of his own gift.

The next which presents itself is the statute of Glouce-

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married a widow, as it appeareth in the statutes of 18 Edw. III., c. ii., 1 Edw. VI., c. 12." The constitution here mentioned is in these words: "*Altercationis antiquæ dubium præsentis declarationis oraculo decedentes Bigamos omni privilegio clericali declaremus esse nudatos, et coercioni fori secularis addictos, consuetudine contraria non obstante, ipsis quoque anathemate prohibemus deferre tonsuram vel habitum clericalem.*" "This council was holden," says Coke, "Boniface VIII. being pope;" and he cites, "Per Decret. Epistol. Gregor. IX., lib. vi., decretal; a Bonifacio VIII. in Lugd. Conc. Edit." The Council of Lyons, no doubt, was in 1274, two or three years after the accession of Edward I., and under the popedom of Gregory X., when twenty "constitutions" were made as to the election of bishops and the ordination of clerks, etc. Pope Boniface VIII. was elected in 1294, twenty years later; but he, no doubt, reaffirmed these constitutions, one of which was here enforced by the legislature.

<sup>1</sup> This is the constitution of Gregory X. in the General Council of Lyons; and is to be found in the *Sextus Decret.*, lib. i., tit. 12.

<sup>2</sup> Ch. 6.

<sup>3</sup> *Vide ante*, c. viii.

ter, 6 Edw. 1., containing fifteen chapters. We shall divide the provisions of this, as we did those of the former statutes, according to their matter; that is, into such as regard tenures and property, and those that relate to the administration of justice, whether civil or criminal.

The remedy a lord had against his tenant for default in service, was by seizing what was on the freehold as a *namium*, and holding it till the arrears were paid: another course was now directed in such situations as were thought likely to produce a defect in service. It was ordained, that where a man let his land in fee farm, or to find estovers, in meat or in clothing, amounting to the fourth part of the real value of the land, and the tenant suffered the land to lie fresh for the space of two or three years, so that no distress could be found thereon (*a*) whereby to compel a render

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(*a*) Here again we have an embodiment in an ancient and obsolete enactment of a *principle* which has never been departed from, and has been embodied in more modern statutes. That principle is, that if the landlord can find no distress by which to levy his rent, he ought to be allowed to re-enter. At the time of this statute, the tenant meant the tenant of the freehold—at all events, of a life estate; “so as there must be,” says Coke, in commenting upon it, “a tenure between the feoffor and feoffee in fee simple, for a *cessavit* lieth not upon such a reservation without such a tenure. At the making of the act, all estates of inheritance were in fee simple, and therefore the donor on an estate-tail created by a statute made after this act (the statute *De donis, vide post*) shall not have the *cessavit*, for he holdeth not the land as this act speaketh, which *ought to be overt*, and *sufficient to the distress of the lord*” (2 *Inst.*, 296). Here is the general principle laid down, which is thus further expounded by Lord Coke: “The land is said in law to be fresh, not only when there is no cattle or other thing distrainable upon the land of the value of the rent, but also yet though there be a sufficient distress to be taken, yet, by construction upon the act, if the land be so im-mured or inclosed about, as that the lord cannot come to take and carry away the distress, it is said to be fresh, that is, without profit to the lord, for though it be sufficient, yet is not sufficient to his distress; as the land must lie open and sufficient to the distress of the lord, or else it is said in law to be fresh within the statute, which construction is worthy of observation” (2 *Inst.*, 296). As, no doubt, it is, being a very remarkable illustration of that robust construction which was applied by the courts to our old statutes, conceived as they were in terms more general than modern legislation. This, however, was the principle, and it is obvious that it would be equally applicable to landlords in cases of the tenancies more usual in modern times, viz., tenancies for terms of years. But, on the other hand, it was considered necessary to have additional legislation to apply it to such tenancies; and accordingly, it was so applied in the Landlord’s Act of 11 Geo. II., c. xix., s. 16, which recited that landlords are often great sufferers by tenants suffering the demised premises to lie uncultivated without any distress thereon, whereby the landlord might be satisfied, and then enacting, that if the tenant should desert the premises, and leave the land uncultivated or unoccupied, so as no sufficient distress could be had, then the landlord might, by a certain summary proceeding, re-enter. Thus, after the lapse of centuries, the principle established in the above ancient act was reapplied.

of the farm or rent, or a performance of what was contained in the deed of lease, then the lessor, after the end of two years, might have an action to demand the land in demesne, by a writ to be had in the chancery. If the tenant came before judgment, and paid the arrears and damages, and found such surety as the court approved for payment of the future demands, he was to retain the land; but if he delayed till after judgment, he was to be barred forever.<sup>1</sup> The writ framed upon this statute was called a *Cessavit per biennium*, and was considered in the nature of a writ of right. The putting the lord in possession of his tenant's land by this writ seemed to be a recurring back to the ancient remedy of seizing the freehold,<sup>2</sup> under the guard, however, of a formal legal proceeding.

Much has been said on the great force of a warranty, one of which was, that as it bound the heir to protect the donee in possession of the land, so it, *à fortiori* barred him from ever claiming it against the deed of his ancestor. This point of law was not always consonant to reason and equity. Thus, in case of an alienation with warranty, by a person holding *per legem Angliæ*, that warranty, descending upon the heir, barred him from claiming the inheritance of his mother by action; but, considering the inheritance did not belong to the father, this was an apparent injustice to the heir, and therefore the following statute was made to regulate it. It was ordained, that if no inheritance descended to the heir from his father, the father's warranty, though for him and his heirs, should not bind the heir, nor be a bar to his demanding and recovering the land by writ of mortancestor, of the seisin of his mother: but if any inheritance did descend to him *ex parte patris*, he should be barred as far as the value of the inheritance which descended; and if any descended to him afterwards through his father, then the alienee should recover against him of the seisin of his mother, by a judicial writ, to issue out of the rolls of the justices before whom the plea was, to resummon the warranty, as was done in other cases where the warrantor came into court, and said that nothing descended to him from the person upon whose deed he was vouched. As the son was to recover by mortancestor, so his issue might have a writ of *cosinage*, of *aiel*,

Warranty of  
tenant *per*  
*legem Angliæ*.

<sup>1</sup> Ch. 4.

<sup>2</sup> *Vide ante*, c. v.

and *besaie!*. In like manner, the heir of the wife was not to be barred of his action after his father's and mother's death by any deed of his father, if he demanded his mother's inheritance by a writ of entry *sur cui in vita*, unless a fine had been levied thereof in the king's court.<sup>1</sup>

This provision seems conceived upon an idea that had long prevailed respecting warranty; for, at common law, the heir was not bound to make recompense, unless *sufficient* to enable him so to do had descended to him from the warrantor; and he was bound *ad excambium* only *pro rata*, as far as the *assets* (as they were afterwards called) would go.<sup>2</sup> In like manner, after this statute, the heir of a tenant *per legem* was not to be barred, unless an equivalent descended to him from his father, who made the warranty. This was going a step further than the common law had gone; for, though an heir was not bound *ad excambium* beyond the assets which descended, it does not appear but that he was bound to warrant, and, of course, barred from claiming the land against the warranty of his ancestor, notwithstanding no assets at all came to him by the same descent.

If the interest of the heir was protected against an unjust alienation of the mother's estate by the father, it deserved no less security against the alienation of the father's inheritance by the mother; not that a gift or feoffment by the tenant in dower could not be avoided by the entry of the reversioner for the forfeiture, but that the mischief was often carried out of the reach of the law in this way. Thus, if the feoffee or any other died seized, the entry of him in reversion was taken away, and he could have no writ of entry, as the law now stood, until the death of the tenant in dower; at which time the warranty contained in her deed (as most deeds had a clause of warranty, especially when it was with a direct design to bar the heir) would descend upon the reversioner if he was her heir, as he generally was, and so bar him of the inheritance forever.<sup>3</sup> To remedy this, it was ordained that in such case the heir or other to whom the land ought to revert after the woman's death, should have present recovery; that is, should have right, in her lifetime, to demand the land by a writ of entry to be made in the

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<sup>1</sup> Ch. 3.<sup>2</sup> *Vide ante*, c. vii.<sup>3</sup> 2 Inst., 309.

chancery.<sup>1</sup> The writ framed upon this statute was called a writ of entry *in casu proviso*, and the words of it are general, *et quæ post dimissionem factam ad præfatum, etc.*, without expressing any estate, *contra formam statuti de Gloucester de communi concilio regni nostri inde PROVISI, reverti debet per formam ejusdem statuti, etc.*<sup>2</sup>

The law of damages underwent some change. Damages used to be awarded in assizes of novel disseisin against the disseizors only;<sup>3</sup> and if they were unable to make amends, the disseizee was without recompense: but it was now ordained, that should the disseizor alien the lands, and not have that whereof damages might be levied, the person into whose hands the tenements came, should be charged with the damages, so that each should answer for the time he held them; likewise that the disseizee should recover damages, in a writ of entry *sur disseisin*, against him who was found tenant after the disseizor (a). It was further provided, that whereas damages were not recoverable in a writ of mortdauncestor, except against the chief lord, by stat. Marl.,<sup>4</sup> damages for the future should be recovered in that writ, as in one of novel disseisin; and also in writs of *cosinage*, *aiel*, and *besaiel*. Further, as damages had been heretofore taxed only to the value of the issues of the land, it was provided that a demandant in future should recover the costs of his writ purchased, together with the damages, not only in the above instances, but generally in all cases where he was entitled to recover damages; which is the first law obliging the unsuccessful party to pay the costs of suit. It was, moreover, enacted, that damages should, in all cases, be rendered where the land was recovered against a man, upon his own intrusion, or his own act.<sup>5</sup>

We have before seen what the common law ordained in

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(a) "Here," says Lord Coke, "is express mention made but of the costs of the writ, yet it extendeth to all the legal costs of the suit, though not to the costs and expenses of his travel and loss of time; and these costs must appear to the court to be legal costs and expenses" (2 *Inst.*, 238). And so of the words, "Et tout ces soit tenus en tous cases ou trouve recover damages," he says, "This clause doth extend to give costs where damages are given to any plaintiff in any action by any statute made after this parliament" (*Ibid.*, 289). These instances are illustrations of the large and liberal way in which these ancient statutes have been extended by construction, rather by their spirit than their terms, when they are enabling and beneficial.

<sup>1</sup> Ch. 7.

<sup>2</sup> 2 *Inst.*, 310.

<sup>3</sup> *Vide ante*, c. vi.

<sup>4</sup> *Viz.*, c. 16. *Vide ante*, c. viii.

<sup>5</sup> Ch. 1.

cases of waste,<sup>1</sup> and what provision had been made by stat. 52 Hen. III., cap. 23,<sup>2</sup> and 3 Edw. I., c. 21.<sup>3</sup>

Waste.

It was now provided, that a writ of waste might be had in chancery against one who held *per legem Angliæ*; in which case, it should seem, it did not lie at common law; and, in addition to the former statutes, it was now declared, that it should lie where any one held for term of life, or in years, or in dower(a). Not that the common

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(a) Here, again, is an illustration of the ancient embodiment of a principle which has in later times received an adaptation suited to the alteration of circumstances. As Lord Coke observed in his commentary, the act introduced that which was not at the common law as to persons liable to the action. For the action of waste, like all the old real actions, lay only against the tenants of the freehold; for which reason it appears to have been for permissive waste, as it is called, *i. e.*, allowing a place to go to ruin, as well as for actual commissive acts of waste or devastation, as pulling down buildings or cutting down trees. For it stood to reason that a person who had a freehold estate in the place should keep it from falling into decay, for the sake of the reversioner, who could not, as in the case of a mere tenant, for years enter to do repairs, and prevent the ruin; and, as Lord Coke points out, had not had any opportunity of exacting covenants to do repairs, since in most cases the tenant of the freehold was in by act of law. And thus the allowing a place to fall to ruin was deemed the same thing in effect as doing acts of waste, and indeed seems to have been so called, as the old entries always speaks of waste as being done. Bracton treats of the subject (lib. iv., fol. 315), and assumes it to be an injury to the inheritance: "*Vastum erit injuriosum, nisi vastum ita modicum fuerit propter quod non sit inquisitio facienda*" (lib. iv., c. xviii., s. 12, fol. 316). On account also of the importance of the inheritance, the common law allowed writ of prohibition to prevent waste (which might be irreparable), as well as action to punish it. "Now the remedy at common law," says Coke, "was in two degrees — first, that if he that had the inheritance did fear (for example) that the tenant in dower would do waste, he that had the inheritance might, before any waste done, have a prohibition directed to the sheriff, that he shall not permit her to do waste: '*Quod non permittas quod talis mulier faciat vastum,*'" etc. And as Bracton said: "*Et hoc faciat tempestive, ne per negligentiam damnum incurrat, quia melius est in tempore occurrere, quam post causam vulneratum remedium quærere*" (lib. iv., fol. 315). "And the sheriff, having this writ, might, as in the case of a writ of estrepement, take *posse comitatus*, and withstand the doing of any waste" (2 *Inst.*, 299). For the same reason, the reversioner, for waste actually done, might recover treble damages, and also the place wasted. But if the law granted away the reversion, the action failed at the common law (for waste done after the assignment), "whereby," says Coke, "it appeareth how necessary it is for the understanding of the act, to know what the common law was, and the reason thereof before the making of the act" (*Ibid.*, 300). The reason thereof was, that the action was thought requisite for the protection of the inheritance. This statute, however, gave it in tenancies for life, or for years; but it did not alter the description of the character or nature of waste, which remained as before, at all events, as to wilful or actual waste. And it should seem that, in cases of tenancy for life or years, where very small damages were found, the place wasted was not

<sup>1</sup> *Vide ante*, c. vi.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

law had already provided no redress in all such cases of waste; for we have before shown, upon the authority of Bracton, that a proceeding might be had for waste against

necessarily recovered (*Fitz. Abr.*, "Waste," fol. 111, 8 *Edw. II.*; *Ibid.*, fol. 146, 34 *Edw. III.*; *Year-Book*, 14 *Hen. IV.*, 11; *Bro. Abr.*, "Waste," fol. 70). Waste lay at common law, not only for wilful, but permissive waste; for in the earliest cases in the Year-Books, we find mention made of extraordinary causes of waste, which would excuse or make an exception to what would otherwise be considered waste, as, for instance, tempests, accidental fires, and the like (*Year-Book*, 40 *Edw. III.*, 3, 5, 6, 25; 43 *Edw. III.*, 24). And it was no excuse that a place was feeble when demised, if it fell into ruin through the default of the tenant (42 *Edw. III.*, 21, 22). An infant in ward could, it was held, have the action against his guardian (43 *Edw. III.*, 6). It was considered, in the reign of Edward III., that waste lay in cases of leases for life or for years (34 *Edw. III.*, 5). If a house fell through the default of repairs, as of roofing, it was waste (44 *Edw. III.*, 44). There was, it will be observed, a distinction between the "action for waste," which implied an abuse of a right, and trespass, which implied a bare tort. In the action of waste, the place wasted was recovered with treble damages (41 *Edw. III.*, 23). And waste lay against a tenant for years, or even from year to year; but not against a tenant at will, because the lessor could re-enter at his will, and the tenant would be liable in trespass (48 *Edw. III.*, 25). It was said that no action of waste lay at the common law before the statute of Gloucester, except against tenant in dower and guardians; and by the statute, the action of waste was given against the tenant by the courtesy tenant for term of life, and tenant for term of years, but not against tenant at will; and if he cut trees, trespass would lie (21 *Hen. IV.*, 38). But this was meant, as is manifest, of wilful waste, and there might be a distinction between that and permissive waste. In the reign of Edward III., it was held that a tenant for life was liable for permissive waste; and if a house should be ruinous for want of sufficient roof, and the tenant suffered it to be more ruinous than it was, the action would lie (*Year-Book*, 45 *Edw. III.*, f. 3). So waste might be committed in permitting a building to fall into ruins, for the tenant was considered bound to keep it in the same state in which it was when he took it (*Year-Book*, 5 *Edw. IV.*, 89). The courts seem, as to the forfeiture, to have entertained an equitable jurisdiction in cases of this kind (*Eldon & Governors of Harrow School v. Alderton*, 2 *Bos. & P.*, 87). "The doctrine prevailed as early as the time of Bracton, who wrote before the statute of Gloucester" (Heath, J., *Ibid.*, p. 88). And unless the jury found the place wasted, the plaintiff could not have judgment (*Redfern v. Smith*, 2 *Burg.*, 262). The courts, in fact, followed the spirit of the action, which was protection to the inheritance. On the same principle, when as the real actions become obsolete, the action on the case was substituted, it was held that it did not lie against tenant for years for mere permissive waste, in not keeping up the premises (*Gibson v. Wells*, B. & P., N. R., 290). And when the old action of waste became obsolete, or in cases where it would not lie, as cases of copyholders, equity interfered by injunction (*Dench v. Brampton*, 4 *Vesey, Jun.*, 706, 3 *Swanston*, 497), or writs of prohibition and assistance were granted out of chancery to prevent a prebendary from committing waste on his prebend (*Ackland v. Atwell*; 3 *Swanston*, 499). Thus through the course of six centuries the same principle has pervaded the law on the subject, the general rule of equity being not to interfere except in order to prevent irreparable injury to the inheritance. The writ of estrepement of waste lay to prevent waste being committed *pendente lite* (2 *Inst.*, 328), *vide post* on the statute of Gloucester.

a tenant in dower, a tenant for life, and a guardian.<sup>1</sup> It ordains, that a person attainted of waste should lose the thing wasted, and should moreover make recompense to treble the sum at which the waste was rated. Whereas it was directed by the Great Charter,<sup>2</sup> that guardians doing waste should lose their custody, it was now declared, that should the remainder of the wardship not be equal to the waste sustained, the guardian should make it up in damages.<sup>3</sup>

The increase of frivolous suits in the king's superior courts occasioned probably the following law (a). It was

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(a) Lord Coke in his commentary says: "The inferior courts, which are not of record, cannot regularly hold plea of debt or damages under 40s." (*i. e.*, as he explains on the next page, without the writ of justices); and then he observes that the ounce of silver was, at the time of the making of this act, but twenty pence, and now it is above thrice so much (2 *Inst.*, 311); but it is manifest that many other considerations enter into the question of the comparative value of money at two periods, besides the mere price or value of bullion, or the intrinsic value of the coin. There is also the question of prices of commodities, alterations in which may make a penny in one age go further than a shilling or five shillings in another. Added to which, the comparison must be made with the period when the limitation of jurisdiction, if it ever existed, must have arisen—that is, in times anterior to the Conquest. And in Saxon times, when only five pence went to the shilling, and a shilling was the price of a cow, we can hardly have an idea of the value really represented by forty shillings. Even in the reign of Edward IV. (as appears by the old ballad of the king and the tanner), a wealthy yeoman would only give four shillings for a horse, which would now perhaps cost forty pounds. And in the reign of Henry VI., forty shillings per annum was the qualification of the electors of knights of the shire, and even of knights themselves. The difference, therefore, between the real value of such a sum at the time of the Conquest and at the time of Lord Coke, or even of the statute, can hardly be estimated. In a note in the Introduction, cxxxi., some curious illustrations are adduced upon the subject. Elsewhere Lord Coke himself says, "a day's work of a ploughman, *i. e.*, including the plough, the horses, and the two ploughmen, was only estimated at the small sum of eight pence," and that no doubt was an exorbitant estimate, as it was *pro servicio regis* (4 *Inst.*, 209). So elsewhere it appears that to take a cart and horses, and a cart-load of corn, was not necessarily an excessive distress for four shillings. It is facts like these which help us to understand the real comparative value of money at different periods; and according to

<sup>1</sup> Lord Coke lays down the law of waste in a different manner. He says, that it was punishable at common law in three persons, that is, in tenant in dower, tenant by courtesy, and the guardian; but not in tenant for life, or for years. However, that writer gives no authority for his opinion, unless the following observation is to be considered as such, namely, that the law which created the former of these estates and interests provided a remedy itself against waste, but left the owners of land, who created the others, to provide a remedy in their demise. *Vide ante*, 173, and *post*, 479. 2 *Inst.*, 299. Reg., 72. Bro., Waste, 88.

<sup>2</sup> Ch. 4. *Vide ante*, c. vi.

<sup>3</sup> Ch. 5.



declared that sheriffs should continue to hold pleas of trespass in their counties, as before; and further, that none should have writs of trespass before justices, unless they swore by their faith that the goods taken were worth forty shillings at the least (which was the ancient limit to the sheriff's jurisdiction) (a); if it was a beating, the

the most probable estimate that can be made, the sum of forty shillings at the Conquest would be equivalent to much more than £50 at the present period, so that the compulsory jurisdiction of the county court (subject to removal for good cause) would be fixed at £50. It may, however, be gravely doubted whether it might not safely be fixed at a much higher rate. As to the writ of *pone*, for the removal of pleas into the superior courts, 2 *Inst.*, 339; *Stat. of Westm.*, 2. So in *Brooke's Abr. Jurisdiction*, fol. 98, *vide Registrum*; that in writ of trespass, where the defendant pleads that it is his soil and freehold, or otherwise the freehold comes in question in the county court; the matter shall proceed there, but not if it comes in issue as a plaintiff without writ (*i. e.*, writ of *justicies*); that is sufficient to remove the record, *i. e.*, into the superior court. See also cases in *Bro. Ab. Recordare, et vide Year-Book*, 30 *Edw. III.*, fol. 22.

(a) It has already been seen that this was not so. The *Mirror* states that it was the limit of the jurisdiction of courts baron and other inferior courts (*c. i.*, s. 15). It was impossible that this or any other amount should have limited the jurisdiction of the county court, seeing that even after the Conquest, and as late as the reign of Henry I., the county court, called "*Curia Regis*," was the *only* court of ordinary jurisdiction. In the reign of Henry I. justices itinerant began to be sent regularly to supersede the county courts in more important cases; and in the reign of Henry II. the court of the king's permanent justices—the justices of the bench, as they were called, in contradistinction from the itinerant justices—had become known as the *curia regis*, and to entertain suits between party and party. And then the county court having virtually to a great extent become superseded in important cases, the notion arose naturally, and was inculcated by the crown lawyers, that the limitation of the jurisdiction of the inferior courts applied to the county court. The consequence was that the king's courts became overburdened with small suits; and the object of the present enactment was to provide a remedy for that grievance. It assumes the limitation of the jurisdiction already alluded to, and the object was to exclude from the superior courts cases within that limitation. In cases of claims or demands for fixed sums or debts there was no difficulty; the difficulty was in cases where the demand was not thus fixed, and was for uncertain damages, the amount of which might be above or below the limitation assumed. And the difficulty was, that as a man could not know beforehand what sum a jury would give for the injury he had sustained, it was impossible to force him to sue in the county court, when perhaps in the superior court he might recover more than the sum limited, though he might recover less. This difficulty still exists, and has caused a distinction to be drawn, in all the county court acts, between claims for debts and for damages; and the endeavor has been to attain the object by means of the deprivation of costs. In the above statute the object was sought to be attained in a more direct way, by means of a preliminary inquiry, *before allowing a party to sue at all in the superior courts*; for though the oath of the party was admitted as sufficient proof of a cause of action of the requisite amount, the *principle* was that of a preliminary inquiry; and it would be quite in accordance with the principle of the enactment to require that a

plaintiff was to swear that the complaint was true. Wounds and mayhems were to be prosecuted as formerly; only the defendants therein were now allowed to make their attorneys if the suit was not by appeal; and if they were absent when attainted, the sheriff was to be commanded to take them, as if they had been present at the judgment. To avoid delays, it was provided that if the plaintiffs in such actions of trespass caused themselves to be essoined after the first appearance, day should be given to the coming of the justices in eyre, and the defendant in the meantime should be in peace. Again, in all actions where there lay the process of attachment and distress, if the defendant essoined himself *de servitio regis*, and did not produce his warrant at the day, he was to give the plaintiff twenty shillings as damages for his journey, unless the justices in their discretion should order more; besides which, he was to be amerced.<sup>1</sup>

The tediousness of the old process was lessened by other regulations. In writs of *mortauncestor*, *cosinage*, *aiel*, and *besaiel*, after issue joined, the inquest was no longer to be deferred on account of the nonage of the defendant.<sup>2</sup> A former statute,<sup>3</sup> which took from parceners the *fourcher by essoin*, was extended to a man and wife, when co-defendants.<sup>4</sup> In conformity with the common law, it was

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judge should be first *satisfied* that there was a cause of action of an amount sufficient to justify a party in suing in the superior court. Of course the judge could not try the case upon affidavit, and it does not appear that the oath of the party could be controverted. But, on the other hand, it does not appear that the court were obliged to be satisfied with a mere general statement upon oath, and that they could not, in order to carry out the object of the statute, require a more particular statement of the nature of the case, so as to enable them to judge how far it was likely to be sustained. It is to be observed that the principle laid down in this enactment, that the question whether a case was or was not fit to be tried in the superior courts should be determined on the *writ*, upon a summary application, is one of immense practical importance, and appears to be well grounded in the common law. For the law was that a man ought not to sue in the local court in a case above forty shillings, without a writ of *justicies*, nor in the king's court, where the cause of action was under forty shillings; and how could that be determined more properly than when the writ was to be issued? So, when a writ of *pone* was required to remove a cause from the inferior court, as being fit for the superior court, it was applied for upon the plaint being made, which answered to the writ in the superior court. It seems to stand to reason that an objection to the suit being brought in, a particular court should be made when the suit is so brought, and as soon as possible.

<sup>1</sup> Ch. 8.

<sup>2</sup> Ch. 2.

<sup>3</sup> 3 Edw. I., c. 43. *Vide ante*, c. vii.

<sup>4</sup> Ch. 10. *Vide ante*, c. vii.

declared that where there were many heirs, though in different degrees, they might join with him who could bring a mortdauncestor.<sup>1</sup>

The remaining provisions concerning civil matters are confined principally to the city of London, and other cities and boroughs; and in that light are of less moment than what has just been mentioned. However, two laws in favor of termors, and to prevent waste, though chiefly designed for the city of London, were extended to the whole kingdom. We have before seen that a term for years was of very inferior consideration in the scale of estates, one circumstance that rendered such an interest peculiarly precarious was, that it was subject to the will of the person having the freehold, who, by a collusive recovery of the land, might entirely destroy the term; for the<sup>2</sup> termor would not be allowed to falsify the recovery, it being a rule that none could falsify the recovery of a freehold but one who had a freehold (a). To remedy this it was now ordained,<sup>3</sup>

Feigned recoveries.

(a) A judgment bound the parties and their privies, that is, in a judgment of land, their privies in estate; and as the title of the termor was derived out of the freehold, he would come within this rule, and be bound by the recovery against his lessor, the freeholder under whom he held, and against whom the recoverer would, if there were no collusion, claim by some title paramount. And as the recovery would lie in a real action, which only lay between freeholders, the termor would have no remedy. If, indeed, he was wrongfully ousted, the law was said to be that he might have an assize of novel disseisin, inasmuch as that remedy rested on unlawful ouster rather than on legal title (*Mirror of Justice*, c. iii., s. 28, title *Disseisin*; and see c. v., s. 1, "Abuses of the Law."). And there was also *ejectione formæ*. But if the recovery was rightful, there was no remedy against the recoverer at the suit of the termor. It may, indeed, appear to require explanation how a recovery of the freehold could affect the title of the termor, which was consistent with the freehold title being in another. The explanation of this is to be found in the nature of real actions, which were grounded on some specific deduction of title; and this would be from a time anterior to the granting of the lease, so as to destroy the title to lease; and then, again, by the judgment in a real action, seisin would be executed, which in those days meant actual seisin, and *prima facie* imported possession. Indeed, this was

<sup>1</sup> Ch. 6. It is laid down by Bracton, that an *assisa* might be joined with a *consanguinitas*, and both be determined upon one writ; as where a sister demanded of the death or seisin of a father, and a son of another sister; in which case the writ would allege. *A. pater B. et avus C. cujus hæredes ipse B. et C. sunt, fuit seisitus in dominico suo ut de feodo, etc.* (*Bract.*, 283 b. *Vide ante*, 157.)

<sup>2</sup> We have before noticed an instance where a collusive term was established by statute against the freeholder, by way of penalty for fraud. *Vide ante*, c. viii.

<sup>3</sup> Ch. 11.

that if tenements in the city of London were leased for years, and he to whom the freehold belonged was impleaded by collusion, and made default after default, or came into court and surrendered the freehold, to make the termor lose his term, and the demandant recovered, so that the termor became entitled to a writ of covenant against his lessor; in such case, the statute directs that the mayor and bailiffs might try by an inquest, whether the demandant had right, or sued by collusion to defraud the termor (a). If the former was proved, judgment was to be given in the suit; if the latter, it was ordained that the termor should continue to enjoy his term, and execution of the judgment should be suspended till the term was expired. This was the course directed when a suit depended before the mayor of London, in which case the inquiry used to be made by writ in nature of a commission grounded upon this statute. At the close of the act is this clause: "And in like manner shall it be done, in like case, *before justices*, in an equitable way, if

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the real ground of the plea of freehold in an action of *trespass*, that *prima facie* it showed possession in the party pleading it; and although a lease might be replied, and would show possession in the lessee, that was only when a good title to make the lease was deduced from a tenant of the freehold. And in these ancient times "the tenant" meant the tenant of the freehold. In those times fraudulent recoveries were often resorted to; as, for instance, to evade the *condition* on which the land had been taken, and acquire an absolute title. Thus it was held that where a feoffee on condition suffered a man who had right to recover by false title, the feoffor could enter and falsify the recovery (*Year-Book*, 44 *Edw. III.*, 8). It was also laid down that even where a man who had cause of action made by covin an entry upon which he recovered, the disseizee could re-enter or have an assize, and the recovery would not aid, by reason of the covin (44 *Edw. III.*, 46). But only those who had a freehold title could falsify a recovery, and a real action for it could only be by another real action which required a freehold title. Hence it was held that a termor could not falsify a recovery of the freehold by the common law, for he could not have the estate which was recovered, because it was a recovery of the freehold, and the term was a mere chattel, though the contrary was held by Littleton (9 *Edw. IV.*, fol. 48). And in a case long afterwards, which was not within the terms of the statute, so that it became material to consider what the law was apart from the statute, two judges held that a termor could at common law falsify a recovery (4 *Hen. VII.*, fol. 10), though it was doubted. It would appear, therefore, doubtful whether the view of the law above stated was really correct (43 *Assize*, fol. 41). And probably this statute, like so many others, was declaratory.

(a) This was the remedy given by another statute with reference to feigned recoveries in evasion of the law of mortmain. It must always be borne in mind that a recovery, even if really valid, was not binding, except between the parties and their legal privies, that is, privies in estate. Thus the *heirs* would be bound.

the termor challenge it before the judgment." This was a general clause, extending the former part of the act to the whole kingdom; and by virtue of this a termor might before judgment pray to be received to defend the right and interest of his term, on the default, or render, or *nient dedire* of the tenant, but not upon faint pleader. The effect of such interference and receipt of the tenant would be (if he proved the collusion), that execution should be suspended during the term, as in the former case; for the act says, *en mesme le manner*.<sup>1</sup>

This is the first statute that gave receipt in any case; but the principle upon which a person interested was allowed to interpose in a suit that was likely to affect his interest, is to be found in the old practice at common law. Thus, if a tenant for life, or in dower, was impleaded, and neglected to vouch the reversioner in fee, the reversioner might appear unvouched, and enter into the warranty.<sup>2</sup>

A law concerning waste was made for the city of London, and, like the former, was, by a clause at the end, extended to the whole kingdom. This ordains that, *pendente lite* in the city of London, no tenant should have power to commit waste, or estrepement of the land in question; and if he did, that the mayor and bailiffs, at the proper suit of the demandant, should cause the land to be safely kept. This was to be observed in other cities and towns, and *everywhere else* in the realm.<sup>3</sup> Upon this act was framed a judicial writ of *estrepement*, which was granted out of the bench where the principal writ was returned, the old writ of estrepement being, like other original writs, suable only out of the chancery. The judicial writ was in effect a prohibition, upon which there might be an attachment, and the parties would come to pleading.

It seems that in London there was an assize called an assize of *fresh force*. This was not a proceeding by writ, but by bill in the city court; and no damages were recoverable. As it was, on this account, less effectual than an assize of novel disseisin at common law, damages were now given.<sup>4</sup> If in a suit in the city of London, a person was vouched in a foreign country, a difficulty arose, which was now removed by a statute, directing that a *recordari*

<sup>1</sup> 2 Inst., 324.<sup>2</sup> *Vide ante*, c. vii.<sup>3</sup> Ch. 13.<sup>4</sup> Ch. 14.

*facias* should issue to remove the cause into the bench, and that a *summons ad warrantizandum* should issue out of chancery. After the vouchee had answered in the bench to the warranty, the cause was to be remanded.<sup>1</sup> Some little alteration was made in this proceeding by a sort of writ directed to the justices of the bench, which is now, like some other instruments of the same kind, placed among the statutes as an act of the legislature.<sup>2</sup>

There is only one chapter in this statute that relates to criminal matters. By this it was intended to check the frequent issuing of writs *de odio et atia*, and to appoint a course of bringing persons accused to answer for their offences.<sup>3</sup> The king commandeth, says the act, that no writ shall be granted out of chancery for the death of a man, to inquire whether the person killed the deceased by misadventure, or *se defendendo*, or in any other manner feloniously; but such person shall be kept in prison till the coming of the justices in eyre, or justices assigned to deliver the gaol, and then shall put himself upon the country, *de bien et de mal*: and if it appears to the country that he did it *se defendendo*, or by misadventure, then the king, upon the record of the justices, may take him to his grace, if he pleases; that is, upon the record being certified into the court of chancery, which court was *CORAM REGE in cancellaria*, a pardon would issue from the chancellor. It had before been a matter almost of course to grant pardons in homicide *se defendendo*, and by misadventure;<sup>4</sup> which merciful usage, therefore, was only confirmed and secured to the subject by this statute.

<sup>1</sup> Ch. 12.

<sup>2</sup> This is stat. 9 Edw. I., stat. 1. At the close of this statute is a memorandum to the following effect: "That this article was signed under the great seal, and sent to the justices of the bench, after the manner of a writ patent, with a certain writ closed, dated by the king's hand, that they should do and execute all and everything contained in the article aforesaid, albeit that the same did not accord with the statute of Gloucester in all things." A similar instrument follows also the statute of Gloucester, beginning thus: "After, by the king and his justices, certain expositions were made upon some of the articles above-mentioned." Of a similar nature with these two acts was the statute of bigamy just mentioned. Such facts as these, at a period when law and legislature were more regarded than they had been a century ago, are very remarkable examples to confirm the observation before made respecting the king's authority to frame such legislative acts as were calculated to promote a better administration of justice. *Vide ante*, 363, 364.

<sup>3</sup> 2 Inst., 315.

<sup>4</sup> *Vide ante*, c. viii.

The act goes on to remedy the obstruction occasioned to justices by the frivolous objections, to which the proceeding in appeals was liable. It says, that appeals shall not be abated so easily as they have been; but if the appellor declare the fact, the year, the day, and hour, the time of the king, the town, and the weapon, the appeal shall be good and valid, and shall not be abated for want of fresh suit, provided the party sue within a year and day after the fact;<sup>1</sup> so that the old learning about *fresh suit* became henceforward obsolete.<sup>2</sup>

In the next year was passed the famous statute, 7 Edw. I., of mortmain, or *de religiosis*, as it is sometimes called. The object of this law was to Statute of mortmain. aid in enforcing the provision of the Great Charter on the subject of alienation to religious societies, and to carry that restriction somewhat further.<sup>3</sup> Notwithstanding the above law, religious men continued to accept gifts, and to appropriate lands, whereby services that were due for such lands, and that were originally designed for defence of the realm, were withdrawn, and what was an object of more anxious concern to great lords, the valuable casualties of tenure were gradually diminished (a). To prevent

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(a) But it was held that this did not apply to a mere term for years of ordinary duration, *petite terme*, i. e., for twenty or forty years, for that was not deemed to be contrary to the statute *de religiosis*, otherwise if it was of a long term, as of a hundred or two hundred years, so that, by long continuance of possession, the land would be in mortmain; but of a short term the law would not take regard as within the statute for forfeiture of the land. It was not the intent of the statute, it was said, that there should be an inquiry as to collusion, where all that was recovered was a chattel. The intent of the statute was where the religious house was to recover the fee-simple (*Year-Book*, 3 Edw. IV., c. 13). For it was said that, according to Magna Charta and the statute *de religiosis*, the religious houses were not to take lands in fee-simple, and then in this statute it was said that, by *color* of a term or gift in fee, the land should not be in mortmain. Then, as notwithstanding those statutes, religious men would recover by default, by the covin and collusion of the tenants, so that the statutes were eluded; then for that reason the statute of Westminster 2 was made "*cum viri religiosi, etc., implacitent aliquem et implacitatus fecerit defaltam*," then the collusion shall be tried; and that, it was said, was meant of suits in which the lands should be recovered in fee; on the other hand, some of the judges took the opposite view, that the case of a term of years came within the mischief of the statutes, and the arguments form the best possible exposition of them. One of the judges thus stated their scope and effect: "At the common law, before the statutes, every man of religion could purchase (i. e., acquire) lands or tenements as well as any layman or temporal person. And it was mischievous to the country, for many services of the land ordained in defence

<sup>1</sup> Ch. 9.<sup>2</sup> *Vide ante*, c. viii.<sup>3</sup> *Ibid.*, c. vi.

this, it was ordained, in the most comprehensive and full expressions that could be contrived, that no person whatsoever, religious or other (*a*), should presume to buy or sell, or under color of any gift, term, or other title whatsoever, receive from any one, or in any other way, *arte vel ingenio*, appropriate to himself any lands or tenements, so as such lands or tenements should come into mortmain,<sup>1</sup> under pain of forfeiting the same: and if any offended against this act, it was made lawful for the chief lord next immediate, within a year, to enter on the land, and retain it in fee and inheritance. If he neglected during that year, the next superior lord might enter; and if he did not enter within a half year, the right of entry was to accrue to the next superior lord; and if all the lords, being of full age, within the four seas, and out of prison, neglected to avail themselves of the forfeiture, the king might take the lands into his hands and infeoff others, saving to the chief lords of the fees their wards, escheats, and other services.

Notwithstanding the solicitude with which this statute

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of the realm were decayed, and for that the statutes of Magna Charta, *de religiosis*, and Westminster 2 were made, restraining the acquisition of land by men of religion and recoveries by them. But this case is out of the statutes." Littleton, however, seems to have been of a contrary opinion, but the actual determination on the point does not distinctly appear. The exposition of the scope and policy of the statutes, however, is equally valuable (3 *Edw. IV.*, 15). The action in that case was, it is to be observed, one of *waste*, which lay against the tenant of the freehold, and in which incidentally the land was recovered. But usually a recovery was in a writ of right.

(*a*) Therefore it was held that the statute included and applied to gifts of land to a parson and his successors. It was held, in the reign of Edward III., that if a man give land to a parson and his successors, or to a vicar and his successors, it ought to be by a license, and this by virtue of mortmain; for the parson and his successors, or the vicar and his successors, are incorporate by the common law (*Year-Book*, 40 *Edw. III.*, fol. 27, 28). There appeared to be a question whether a devise of land to raise an income for the support of a chaplain was in mortmain or not. Thus, it being found that one R. was seized of land in Wood Street, Cheapside, and devised the rents in fee to pay annually £12 to find two chaplains to chant for his soul *in perpetuum* in the church of St. Albans, in Wood Street, it was held not to be mortmain (40 *Assize*, 26). But in another case where land was devised in fee to find six marks a year to provide a chaplain in perpetuity, it was adjudged in chancery to be mortmain (43 *Assize*, fol. 33). But Brooke remarks, "*quod mirum*," as there was no *corporation* or incorporate body to receive the rent (*Bro. Abr., Mortmain*, fol. 24), and he refers to other similar cases where it was held that such endowments were *not* within the law of mortmain (*Ibid.*, fol. 23, fol. 25; 43 *Assize*, 27; 43 *Assize*, 34).

<sup>1</sup> *In mortuam manum.*



seems to have been penned, a method of evasion was soon discovered by ecclesiastics. This was to recover lands by default, in a collusive suit brought against the person who had in contemplation to bestow lands in mortmain (*a*). Although this proceeding was by consent and fraud, yet the justices held that the religious and ecclesiastical persons did not appropriate such lands *per titulum doni, vel alterius alienationis*, as the statute of mortmain expresses it, nor that they were within the words *aut alio quovismodo, arte vel ingenio*. For as recoveries were prosecuted in a course of law, they were by law presumed to be just and lawful; and it was accordingly held by the justices, that they were not within the statute. These fraudulent recoveries were practised very soon after the statute was made, and in a few years grew to such a height as to occasion a parliamentary interference. It was ordained in 13 Edw. I.<sup>1</sup> that when a default was supposed to be made for this purpose, it should be inquired by the country, whether the demandant had any right to the land or not: and that, if it was found he had, judgment should be for him to recover seisin; if not, the forfeiture should accrue in the manner directed by the statute of mortmain (*b*). Every one of the chief lords was to be admitted to challenge the jurors of this inquest, and a challenge might be made for the king. The sheriff was to be charged at the exchequer to answer for the lands in question. After this act it was usual, when the land was lost by default, to

(*a*) This proceeding was only effective as between the religious house and the heirs of the virtual donor, the party against whom the recovery was recorded; for it was always a fundamental principle of law that a verdict and judgment only bound parties and privies; that is to say, the original parties to the suit and their legal representatives. The recovery would have no effect as regarded a party claiming by title paramount to the virtual donor, the party against whom the land was recovered, for he could "falsify the recovery," not being estopped by it. This, however, did not apply as regarded the lord, whether mesne or paramount, whose title would only accrue in case of forfeiture or escheat, and as the recovery was not a cause of forfeiture, therefore it was effectual for the purpose of a virtual alienation. Hence the present enactment, which declared that the recovery, unless real, and hostile, and grounded on title, should operate as a forfeiture.

(*b*) It was said, upon this, that where the statute made a judgment by default to be mortmain, judgment *per redditionem*, by confession or trial, should be taken by the equity of the act, *quod non negatur*. And it was also said that the statute of mortmain extended to rents or commons, *quod non negatur*. But these were mere *dicta*, and it should seem that such extensions of penal acts by construction were not legal (*Year-Book*, 3 Edw. IV., 14).

<sup>1</sup> Westm. 2, ch. 32.

award a writ, called a *quale jus* grounded upon this act, in which there was a recital of the recovery; and the sheriff was commanded to summon a jury to try *quale jus idem abbas habuit, etc.*<sup>1</sup> Thus were the clergy hunted out of a new device for enriching themselves; but the practice of conveying land by means of a feigned recovery, in a real action, did not cease with this statute: we shall find in a subsequent part of this history that this became a common mode of conveyance, of equal authority with the ancient ones by feoffment and fine.

There are other statutes on the subject of ecclesiastical possessions which, though properly belonging, in point of time, to the latter part of this reign, will, if transposed to this place, more satisfactorily illustrate this important part of the history of landed property.

In stat. West. 2,<sup>2</sup> a regulation was made for preserving to religious societies the property they had already obtained (*a*). If, says the act, abbots, priors, keepers of

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(*a*) It is necessary, with reference to what follows in a subsequent portion of this chapter, to draw attention to the nature of the tenure on which ecclesiastical property was held, which the author had omitted to do. "Tenant in frankalmoigne," says Littleton, "is where an abbot, or prior, or another man of religion, or of holy church, holdeth of his lord in free alms." And such tenure began first in old time, when a man was seized of land in his demesne as of fee, and if it enfeoffed an abbot and his convent, to have and to hold to these and their successors, in pure and perpetual alms. In the same manner it is where lands were granted in ancient times to a dean and chapter and their successors, or to any other man of holy church and his successors, etc. And they which hold in frankalmoigne are bound of right before God to make prayers and masses and other divine services for the grantors and their heirs, etc. And therefore they *shall do no fealty to their lord*, because these words, "in frankalmoigne," exclude the lord to have any earthly or temporal service. And if they which so hold fail to do such divine service, the lord may not distrain, but may complain to the ordinary, etc. And note, that where such man of religion holds in frankalmoigne, his lord is bound by the law to acquit him of every manner of service which any lord paramount will have of him for the tenements (*Littleton, c. vi.*). So that if the land were held by the grantor on knight-service, he would have to provide the knight-service due in respect of the land. All this is most important, in order to understand the real merits and the motives of the opposition to ecclesiastical property in this age, and the disposition to restrain it. It is manifest that it arose from the loss of feudal services which were not due in respect of the lands of the church. This is plain from another passage at the end of the section in Littleton on the subject, where he says that where the grantor's estate escheated, then the abbot or spiritual person should hold of the lord paramount in fealty only, "because he cannot hold of him in frankalmoigne," whence it appears that those who held in frankalmoigne did not even hold under the obligation of fealty. It

<sup>1</sup> 2 Inst., 429.

<sup>2</sup> Vide ch. 41.

hospitals, and other religious houses founded by the king or his progenitors, alien lands given to their houses by him or his progenitors, the land shall be taken into the king's hands to be holden at his will, and the purchaser lose both the lands and the purchase-money; and if the house were founded by any common person, the heir of the donor shall have the following writ, called since a *contra formam collationis* (a). *Præcipe tali abbati, quòd justè, etc., reddat A. B. tale tenementum quod eidem domui collatum fuit in liberam eleemosynam per prædictum B.*<sup>1</sup> (b); *et quod ad*

is manifest that this was detrimental to the interest of the feudal lords, and hence this and other enactments directed against church property, in pursuance of the policy of the provision in the great charters against alienations to monasteries for the purpose of avoiding feudal services. It is to be observed that Littleton considered the statute of this reign, *Quia emptores*, to have been framed with the same policy, for he says of it that it prevented any further alienation of property to religious houses or churches. "If a man grant to an abbot or prior lands in frankalmoigne, these words 'in frankalmoigne' are void, for it is ordained by the statute, *Quia emptores terrarum* (which was made anno 18 Edward I.) that none may alien lands in fee-simple to hold of himself. So that if a man seized of tenements which he holds of his lord by knight-service grants the same by license to an abbot, etc., in frankalmoigne, the abbot shall hold the same by knight-service of the lord of whom his grantor held, and shall not hold of his grantor in frankalmoigne, by reason of the statute. So that none can hold in frankalmoigne unless it be by title of prescription, or by force of grant made before the statute. But the king may grant lands in frankalmoigne"—a case put in quiet irony, for the days had long passed when kings gave lands to the church, and now all their study was, as in the present instance, to take the lands of the church. For in this statute, which our author with grave humor describes as designed to secure the property of the church, the king takes it away. The alienation is declared void, the natural result of which would be that the abbey should retain it, but instead of that the king takes it, and keeps it, and takes the purchase-money as well. The statute of *Quia emptores* prevented the church from having any more lands, and the present and other statutes were passed to prevent the church from dealing with the lands she had.

(a) Here we see that the principle acknowledged by the statute was that if a religious or charitable endowment failed, from neglect of its duties or its object, the endowments should revert to the donors, whence they proceeded. This is in accordance with a general principle pursued by legislation, and recognized both at law and equity. Thus it will be found followed out in other writs in similar cases (*vide post*, c. xv.).

(b) This, it cannot but be observed, was rather an act for securing the property to the king, and it may be remarked that the statute affords the best possible refutation of the notion that ecclesiastical property was inalienable, for it proceeds upon the supposition of an alienation, and then declares the alienation void. Afterwards the supposed inalienability of church property was made an argument against such property. It is further to be observed, that this, like all the other statutes as to ecclesiastical property, professed to be based upon the right of patronage arising out of supposed

<sup>1</sup> Or, *per antecessores prædicti B.*

*prædictum B. reverti debet per alienationem quam prædictus abbas fecit de prædicto tenemento, CONTRA FORMAM COLLATIONIS prædictæ, ut dicit.* So also of lands given for maintenance of a chantry (a), or of a light in a church, or chapel, or

endowment. No trace will be found of any right of interference with church property except upon that principle. The patron and his heirs were supposed to have an interest in the due appropriation of the property of his own dedication, and patronage and endowment were correlative. Hence Littleton laid it down "that none can hold lands in frankalmoigne but of the grantor or his heirs."

(a) The "chantries" were endowments of priests to offer masses for the souls of the donors and their heirs forever. These endowments are also mentioned all through the subsequent reigns, until suppressed in the reign of Edward VI. There were other endowments to find lights, etc., for churches, for the good of the souls of the donors, etc., but these were generally incident to masses for the dead. The chantries were endowed, in order to have perpetual continuance, but chaplains were often retained by contract for salary to offer masses or perform divine services, and if they failed they were liable to be sued on their contracts (50 *Edward III.*, fol. 13). The distinction was between perpetual endowment and temporary contract, but both of these classes of the clergy, the chantry priests and the chaplains, were regarded as distinct from the parochial clergy, who had other spiritual work to occupy them, as visiting the sick, etc., besides the mere performance of the special divine services. The scope of the statute was restricted to *endowments*. The writ of *cessavit* thus given could only be brought by the heirs of the donor, to whom alone the land was to revert (45 *Edward III.*, fol. 15). *Cessavit* against the chaplain of a chantry, supposing by the writ that he held by service of chanting mass every Monday and Saturday throughout the year, and that he and his predecessors, from time whereof memory was not to the contrary, held the lands on that service. It was objected that the statute which gave the action gave it only to the donor and his heirs, and that the plaintiff had not shown that he was donor, or heir of the donor. The statute was read, which ran thus: *Quod competat actio donatori aut ejus hæredes*. And it was held that the writ should abate for the cause alleged, or for that it was so general (*Bellewe's Cases*, temp. Rich. II.). *Cessavit* against a prior for that the ancestor of the plaintiff had given land to the prior's predecessors to chant mass three times a week in the chapel, and that the prior had ceased (*Bellewe*, fol. 82). It is to be observed that the statute West. 2, c. xxiv., recognized these endowments by providing that a chaplain or chantry priest should have a *juris utrum* to recover the lands of the endowment, as a parson could have to recover the lands of his church (*West.* 2, c. 24). And the present statute was passed, on the other hand, to enforce the continuance of the service. It is to be borne in mind that the continuance could not be kept up without incorporation and perpetual succession, nor could this be without the royal grant, while the royal license also was required to allow of endowment in *land*, as it would be in mortmain. Thus in the reign of Edward III. we find that the king granted to J. N. to found a chantry of twelve priests, and it was laid down that he could do this, and that he could have *quare impedit* (28 *Edward III.*, 14). So in the reign of Henry IV. we find a case of disseisin of the chaplain of a chantry (12 *Henry IV.*, fol. 19). And in the reign of Edward IV. it was held that where a chantry was founded, and where land was given to the chantry priest and his successors, it was good in law, *i. e.*, as an incorporation, so as to secure its perpetuity (20 *Edward IV.*, fol. 2).

other alms, if the land given was aliened. If land given for these latter purposes was not aliened, but the alms were withdrawn for the space of two years, the donor or his heirs were to have an action, to demand the land in demesne, as directed by the statute of Gloucester, by a writ of *cessavit per biennium*.<sup>1</sup>

The following may be noticed as an instance of the claims advanced by the clergy. Persons who were tenants to the orders of Knights Templar and Hospitaller enjoyed at this time great privileges, as well against the king as against other lords; as, to be free from tenths and fifteenths due to the king; to be discharged of purveyance; not to be sued for ecclesiastical causes before the ordinary, *sed coram conservatoribus privilegiorum suorum*. Because the knights of both these orders were *cruce signati*, a cross, as the ensign of their profession, used to be erected on their lands, to notify that they were privileged and exempt; and so sacred were such places held, that, at one time, a felon could enjoy sanctuary by flying to these crosses. To abolish these privileges, it was enacted by st. West. 2, 13 Edw. I., c. xxxiii., that wherever such crosses were erected, the land should be forfeited, as land aliened in mortmain. In the st. *quia emptores*, 18 Edw. I., st. 1, c. iii., it was expressly declared that the license to alien there given should not be construed as giving any power to alien in mortmain.

Another provision was made to check the abuse of clerical possessions, one of which was the waste they suffered by being drained into foreign countries (a). This

(a) The effect of which, it will be observed, was that the king could not get at it. No king levied heavier subsidies either upon clergy or laity, but especially on clergy. A few years before this act passed, he levied a *tenth* upon the laity, and demanded from the clergy the *half* of their whole income. He had, some years before this, obtained from the pope the tenth of all ecclesiastical benefices for six years, and, that the grant might be more productive, the assessments were made by a new valuation, taken upon oath (*Dunst.*, 593). It was published in 1380, under the title of *Taxatio Ecclesiastico Angliæ*, auctoritate P. Nicholai IV., A. D. 1291). By this were regulated all taxes to pope and king. In 1297 the king demanded a third or a fourth of the income of the clergy, and on their resistance to the illegal imposition, he issued a proclamation of outlawry against them, and took possession of all their property. And the lord chief-justice of the king's bench was not ashamed to give his public sanction to this act of arbitrary spoliation, and pronounce the sentence of outlawry (*Knyghton*, 2491). Before the writs of outlawry issued, the clergy compounded for a fifth (*Brady*, iii., App. xix.). The laity

<sup>1</sup> *Vide*, 433.

was by a statute passed at the latter end of this reign, *de asportatis religiosorum*, 35 Edw. I., st. 1. It is therein complained, that abbots, priors, and governors of religious houses, and certain aliens, their superiors, used to set talliages and impositions upon monasteries, and houses in subjection to them, so that much of the opulence which was intended for religious service, the support of the poor, sick, and feeble, and maintenance of hospitality, was conveyed out of the kingdom. To prevent these abuses of religious institutions, it was ordained, that no abbot, prior, warden, master, or other religious person whatsoever, should secretly or openly, by any device, carry or send, or cause to be carried or sent, any such tax out of the kingdom, under pain of being grievously punished for such contempt of the king's solemn injunctions to the contrary;<sup>1</sup> and all alien abbots, priors, masters, wardens, and the like, imposing such tax, were to forfeit for the offence everything they had.<sup>2</sup> The provisions of this statute were in aftertimes reviewed by the legislature, when it was employed in devising some method to restrain a new contrivance for enriching foreigners with ecclesiastical property, called *provision* (*a*). The persons practising this new device were called *provisors*, and were made subject to many penalties and forfeitures.

To return to the order of statutes, from which we have been digressing: the next is the statute of Statute of Acton Burnel. *Acton Burnel de Mercatoribus*, 11 Edw. I. The pressing demands of mercantile concerns made merchants complain of the delays and niceties of the law, and request some speedy course might be appointed for recovering payment of their debts at the appointed days; the want of which, it is said, occasioned many merchants to withdraw from the kingdom. The shortening of the

were glad enough to see the clergy plundered, as the more the clergy paid, the less the laity had to pay, and hence king and laity had a common interest in the property of the church; and the object of this act, passed on the eve of the king's expedition into Scotland, when he was more in want of money than ever, was to prevent the pope, or the foreign superiors of the religious houses, from receiving any pecuniary contributions out of their funds. The object of the act was not, as the author's language might lead the reader to suppose, to protect the religious houses, but to preserve their funds for the king, who was desirous that no one but himself should tax them.

(*a*) Here, again, it will be found that the object was to preserve the patronage to the king and other lay patrons (*vide post*, in the reign of Edward III.).

<sup>1</sup> Ch. 2.

<sup>2</sup> Ch. 3.

process of attachment in favor of merchants, as was usual in the last reign,<sup>1</sup> was a partial redress, and since the *solennitas attachiamentorum* had been corrected by several statutes, they seem to have enjoyed no distinction in point of process from common plaintiffs. For the support, therefore, of credit, and the welfare of commerce, the following method of securing a ready payment of the debts of merchants was ordained by parliament. A merchant who wished to be sure of his debt was to bring his debtor before the mayor of London, York, or Bristol, as it might be, or before the mayor and a clerk, to be appointed by the king, there to acknowledge the debt and day of payment; and the recognizance was to be entered on a roll by the clerk. Besides this, the clerk was to make a writing obligatory, to which the seal of the debtor, together with the king's seal (which was to be provided for that purpose, and to be kept by the mayor), was to be affixed. If the debtor did not keep his day of payment, the creditor was to apply to the mayor; and upon view of the writing obligatory, and recognizance, the mayor was immediately to cause the chattels and devisable burgages of the debtor to be sold, to the amount of the debt, by the appraisement of honest men; and the money was immediately to be paid to the creditor: if no buyer could be found, the goods themselves were to be delivered to him. As to the sale of the devisable burgages, the king's seal was to be affixed thereto, for a proof of the sale. If the debtor had no movables within the mayor's jurisdiction, the mayor was to send the recognizance to the chancellor, who was to direct a writ to the sheriff of the county where the goods were, to act as the mayor.

If the appraisers, out of favor to the debtor, set too high a price upon the goods, they were themselves to take them at the price, and be answerable to the creditor for the debt (*a*); but the debtor had no redress if they

(*a*) In the reign of Edw. III., this case arose on the statute. Candish (Cavendish?) came to the bar, and showed how one had made a statute merchant; and he to whom the recognizance was made had sued execution, and that the lands of the recognizer were extended, and the extent returned: and he to whom the recognizance was made, said that they were extended too high, and prayed that the lands might be delivered to the extenders, so that he might have execution against them, and thus have the benefit of the statute of Acton Burnel. And it was awarded by all the justices, that *feri*

<sup>1</sup> *Vide ante*, 263.

were sold under the value; it being his own folly, says the statute, that he did not sell them himself, and pay his debt with the produce. If the debtor had no movables, then his body was to be taken, and kept in prison till he or his friends had made agreement with the creditor; and should he be so poor as not to be able to support himself in gaol, the creditor was to sustain him with bread and water; which expense, as well as the debt, was to be defrayed by the debtor before he could be released. If the creditor was a merchant stranger, the debtor was likewise to pay all expenses attending his extraordinary stay here. If, instead of taking the body, the creditor would accept sureties, or mainpernors, for the payment, they were to bind themselves before the mayor, in like manner as the original debtor, and were to be subject to the same execution; though that was not to be till the goods of the principal were first exhausted.

Complaint, it seems, was made to the king, that this statute had been misinterpreted by sheriffs, and the execution of it delayed, upon various pretences. The king, therefore, in a parliament holden the thirteenth year of his reign, caused the statute of Acton Burnel to be rehearsed, and then several declarations were made by the legislature for enforcing it: these are contained in the *Statute of Merchants*, 13 Edw. I., st. 3. By this act, the recognizance may be taken before the mayor of London, or before some chief warden of a city, or of any other good town where the king shall appoint, or before the mayor and chief warden, or other sufficient men chosen and sworn thereto, when the mayor and chief warden cannot attend; and before one of the clerks to be appointed by the king. The recognizance is to have two parts; one to remain with the mayor or chief warden, the other with the clerks. The seal of the writing obligatory also is to be of two parts; the greater of which is to remain with the mayor or chief warden, the other with the clerk. Instead of the prefatory process against his movables, by this act the body of the debtor, if he is a layman, is to be taken in the first instance, and committed to prison till

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*facias* should issue against the extenders upon the recognizance (*Year-Book*, 40 Edw. III., fol. 27; *et vide* 44 Edw. III., fol. 2; 2 Hen. IV., fol. 17; 2 Rich. III., and 15 Hen. VII., fol. 15). If the conusee once agreed to the extent, he could not disagree afterwards (44 Edw. III., fol. 2).



he has agreed about payment of the debt; and if the keeper of the prison do not receive him, he is to be answerable for the debt: a like power is given to the chancellor, if the debtor is not within the jurisdiction of the mayor. Within a quarter of a year after he is taken, his chattels and land (without confining it to burgages devisable, as the last act did) are to be delivered to him, that he may pay his debts by selling them; and such sale of his lands and tenements during the quarter of a year, for the discharge of his debts was declared good and effectual. If he did not make agreement about payment within the second quarter of a year, all his goods and lands are to be delivered to the creditor by a reasonable extent, *to hold them until such time as the debt is wholly levied (a)*; and the debtor is still to continue in prison, and be kept on bread and water by the merchant. The merchant is to have such seisin in the lands and tenements delivered to him or his assignee as to be entitled to maintain a writ of novel disseisin, and re-disseisin, as if it was a gift of freehold to him and his assigns, till the debt is paid. When the debt is paid, the land is to be restored, and the debtor delivered from prison. The statute directs that writs issued by the chancellor for taking the debtor should command the sheriff to certify the justices of one bench or the other what had been done therein, at a certain day; at which day the merchant is to appear, and there sue, if agreement is not made. If the sheriff returned *non inventus*, or that he was a clerk, then they proceeded against the goods and land, as before-mentioned. The creditor is to be allowed all damages, costs, and ex-

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(a) If the land should be "extended" too low (or for too small a sum), the conusor could not have a re-extent, for he could tender the money and have his land again; and if the land was extended at too high a value, the conusee could not have re-extent, for he could pray that the extenders should have it; and they should answer according to the statute of Acton Burnel (the above act); but it ought to be at the first day of the return of the extent, for if he agreed to the extent, he could not refuse it (*Year-Book*, 15 *Hen. VII.*, 14). And it was held that the conusee, under statute merchant or staple, should recover his costs, damages, and expenses (*Ibid.*). A statute merchant was extended, and the extent returned, and the conusee came and said that the lands were extended too high, and prayed that the extenders should have it according to the statute of Acton Burnel, and it was awarded (*Year-Book*, 40 *Edw. III.*, fol. 21). In another case, the conusee complained that the land was valued too high, that is, at 3s. an acre, whereas it was only worth 1s. an acre (*Year-Book*, 21 *Edw. III.*, 21).

penses. If there are sureties, they are to be proceeded against, as the principal debtor is.

It is ordained by the statute, that all lands that were in the hands of the debtor at the time of acknowledging the recognizance, even if given away since by feoffment, are to be delivered to the merchant; and after the debt paid, they are to return to the feoffee. Further, it was added by way of caution, that should the debtor or his sureties die, the merchant shall not take the body of his heir, but shall have his lands, in like manner as if the debtor was living. All persons might enter into recognizances under this act, except only Jews, to whom this statute was not to extend. There was a saving of the old method of acknowledging recognizances, which was to be practised as before. The writ to take the person recited the acknowledgment of the recognizance, and then commanded, *quodd corpus prædicti A. si laicus sit, capias, et in prisonâ nostrâ salvo custodiri facias, quousque de prædicto debito satisfecerit.*

This last statute may be considered as contributing to extend the power of alienating land. In the same sessions, as we shall see presently, any common creditor by judgment was empowered to take half the debtor's land in execution; but we see that, in favor of trade, a merchant who had resorted to this security might have the whole. A recognizance acknowledged with the formalities here prescribed, was in after-times called *a statute merchant*; and a person who held lands in execution for payment of his debt, as hereby directed, was called *tenant by statute merchant*.

## CHAPTER X.

### EDWARD I.

ORIGIN OF ESTATES-TAIL—REGULATION OF THE EYRE—JUSTICES OF NISI PRIUS—JUSTICES OF GAOL-DELIVERY—OF REPLEVIN—OF ACCOUNTANTS—WASTE—OF EXECUTION OF PROCESS—OF SUMMONING JURORS—OF ESSOINS—WRIT OF ELEGIT—BILL OF EXCEPTIONS—SCIRE FACIAS—CUI IN VITA—QUOD EI DEFORCEAT—OF PRESENTATIONS TO CHURCHES—ADMEASUREMENTS OF DOWER AND PASTURE—WRITS IN CONSIMILI CASU—EJECTMENT OF WARD—PRESENTMENTS OF JURORS TO BE SEALED—RAPE—STATUTE OF WINCHESTER—STATUTE OF CIRCUMSPECTE AGATIS.

THE most distinguished period of this king's reign is the thirteenth year, when great alterations were made in the law by several statutes. In this year we have the statute of Westminster the second, the statute of Winchester, the statute of merchants mentioned in the preceding chapter, and the statute of *circumspecte agatis*. Each of these is an important occurrence in the juridical history of this reign (*a*).

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(*a*) The general legislation of the reign, and indeed of any other, may fitly be considered, first, as relating to the titles of transfer of land; and next, and especially, with reference to religion, or the church; and then as regarded the administration of justice. As regards the titles or transfers of land, this reign is remarkable for the attention given by the legislature to the subject of *fin*es, which were used as a species of record or registration of a title or a transfer of title. The subject of *fin*es is closely connected with that of recoveries, which only differed therefrom in that both, being founded on suits, or supposed suits for land, a fine was in accord entered into by the parties in cases, and a recovery was a judgment recovered by default. And both had this value that, being records of courts of law, they were preserved under the protection of the king's courts, and were not like private deeds, which might be lost or destroyed, a consideration of no small importance in times of constant turbulence and disturbance. These *fin*es or recoveries were solemn records of titles or transfers of title; and there is abundant evidence in the reports and records of subsequent reigns that they were used as far back as the last reign for purposes of conveyance, or as permanent records of conveyance, the titles or limitations of land. *Fin*es thus used, recording several successive limitations, are mentioned as of the time of Henry III. (*vide Year-Books*), and see (*Bellew's Cases, temp. Rich. II., Fin*es). That recoveries were used for the purpose of transfer of land is apparent from one of the earliest statutes of this reign, that of Gloucester (6 *Edw. I., c. 11*), against feigned recoveries, in which he to whom the freehold belonged

In discoursing of these statutes, we shall begin with the statute of Westminster the second. The first chapter of

caused himself to be impleaded by collusion and made default, or came into court, or gave it up; and the legal effect of a recovery is shown by another statute of the same reign (13 *Edw. I.*, st. 1, c. iv.), "that if a man had lost his land by default, he had none other recovery than by writ of right, which was not maintainable by any that could not claim of mere right as tenants for life or entail" (13 *Edw. I.*, s. 1), and that statute therefore provided that they might recover their estate by another writ than by a writ of right, which lay only for the owner in fee-simple. Thus, then, the effect of a recovery by default was, that those who were not parties or privies could recover in a real action according to their right, but then they were driven to such actions. The effect of a record was always that it bound parties or privies, and this applied to a fine as well as a recovery. And hence the subsequent statute (13 *Edw. I.*, c. 32) against feigned recoveries by religious men to avoid the mortmain laws. Thence the statute *de donis* about the same time (13 *Edw. I.*, c. i.) passed against alienations of estates-tail, enacted that fines contrary thereto should be void, so that even the heirs could avoid them. It is observable that there is no prohibition of feigned recoveries to bar estates-tail, although the legislature were well aware that such recoveries were used, having already provided against them in the earlier statute of Gloucester. Then a later statute of the reign (18 *Edw. I.*, s. 4, c. i.), the statute as to the *modus levandi fines*, described the formalities of fines and declared, "And the cause wherefore such solemnity ought to be done in a fine is, because a fine is of so high a bar, of so great a force, and of so strong a nature that it concludeth not only such as be parties and privies thereto, and their heirs, but other people of the world, being of full age, and within the four seas, the day of the fine levied, if they make not their claim of their action within a year and a day." But this certainly was not carried out, for in the subsequent statute (27 *Edward I.*, c. i.) it was provided, that, as fines levied in the courts ought to and do make an end of all matters, and therefore are called fines, but the parties and their heirs had been admitted to defeat them by alleging that they or their ancestors were always seized of the land, it was provided that such exceptions should not be allowed in future. The tenor of these statutes strongly shows the extreme importance attached to these permanent records of titles or transfers of land; and their importance in such an age may easily be understood. Nevertheless, as times altered, and as the law became more firmly settled, the courts of law, in spite of the express provisions of these statutes, permitted persons, at first strangers, and then even the heirs, to defeat fines by showing that the parties to the fines had no estate in the land. The Year-Books of Edward III. and *Belloue's Cases*, temp. Richard II., contain numerous cases of fines defeated on that ground. On the other hand, a statute passed in this reign enabled parties to have executions upon fines without being put to a real action. It is remarkable that in the very statute of Westminster 2, in which fines to bar estates-tail were prohibited, the legislature made provision for the summary execution of fines (*St. of Westminster 2*, c. xlv.), reciting that of such things as be recorded before the judges and enrolled in their rolls, process of plea ought not to be made by summons, etc., as in cases of deeds out of court, and it provided that those things which were found enrolled before them of record or continued as fines, that thenceforth they should have such vigor that it shall not need to plead to them; but when the fine was levied within a year, the party should forthwith have execution, and if the fine was levied of a further time passed, there might be *scire facias* to call upon the opposite party to show cause why the fine should not be executed. The practical

this statute is on the subject of some of those conditional estates of which so much was said in the last reign.<sup>1</sup> It is generally known by the name of the statute *de donis conditionalibus*. This act has occasioned more discussion than, perhaps, any parliamentary provision in the statute-book ; and deserves a very particular consideration in this place. The design of it cannot be better understood than from a recital of its contents. It

Origin of  
estates-tail.

effect of this was, that although fines to bar estates-tail were prohibited (nothing being said against recoveries, which, therefore, there is every reason to believe, continued to be used for that purpose), fines were invaluable as permanent records of the titles to land, and especially of the *limitations* of estates, of estates-tail or otherwise, which were thus placed upon record, and could at any time be executed without putting the party to the delay of a real action, unless defeated by showing that the parties had no estate in the land at the time the fine was levied. And so, in point of fact, fines continued to be used all through this reign and the ensuing reigns (as the reports and records of cases in subsequent reigns show) ; that is, continued to be used for the double purpose of effecting and of recording transfers of land, and placing upon record the titles to land, and the successive limitations to which it was subject. In point of fact, this was the way in which the titles to land were created, transferred, and recorded, and the country, by this system of fines, had the advantage of a system of registration of titles. With regard to recoveries, they were rather used for alienation, or for the alteration of titles and estates. And the use of fines and recoveries for these purposes formed the great features of the law of this period, so far as it related to landed property. The recovery was in form a recovery in a real action by default, and formed all the proceedings proper for such a cause — one of which was public proclamation. And therefore the statute as to the mode of levying fines required that they be openly read in court. The essence and substance of the proceedings were publicity and notoriety, as a means of notice to persons interested. And therefore all who did not come forward within a year and a day were barred. But as the tenants for the particular estate, as tenants in tail, often failed to protect the rights of the issue, it was thought right to provide that the issue should not be barred ; and as in those turbulent times men were often deterred from coming forward, a statute of Edward III. provided that they might come forward at any time. The other head of law relating to the subject is the law of mortmain, which originated in this reign, and was directed against the acquisition of land by the church. The remaining great head of law and legislation in this reign is that which related to the administration of justice. All these matters will be found fully treated of by our author, but it was deemed that it would be of assistance and advantage to the reader to present this general review of the character and tendency of the legislation of the reign, so as to point out or suggest to his mind the connection and mutual illustration of these various heads or subjects of law and legislation.

<sup>1</sup> *Vide ante*, 87, 88.

should revert to the donor or his heir: again, where land was given *in liberum maritagium* (which sort of gift, we know, had an implied condition, that, upon the death of the husband and wife without any heir begotten between them, the land should revert to the donor or his heirs): again, where land was given to a man *et hæredibus de corpore suo exeuntibus*; it seemed hard, says the statute, to the donor and his heirs, that their will expressed in the gift should not be observed; for, says the act, in all the above cases the feoffees *post prolem suscitata, et exeuntem ab ipsis*, have hitherto had a power to alien the land so given upon condition, and to disinherit their issue, contrary to the will of the donors, and the express form of the gift. And whereas, if such feoffees had no issue, and even if there had been any issue, which had afterwards died, the land ought, by the express form of the gift, to revert to the donor or his heir; yet the persons to whom such conditional gift had been made, used to infeoff others, and so bar the donors of their reversion; all which was in direct violation of the form of the gift.

These are the mischiefs of which the statute complains; and to remove them it ordains as follows: that thenceforward "*the will of the giver,<sup>1</sup> according to the form in the deed of gift manifestly expressed, shall be observed;*" so that the person to whom such a conditional gift was made should not have power to alien, and prevent the land from *remaining* to his issue, or, upon failure of issue, to the donor or his heir (a). It was declared that the second

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(a) This plainly alludes to some power of alienation by the tenant in tail to prevent the land from *remaining* to the issue, as well as to alienations upon *failure* of issue. And it would appear that this was the alienation by fine or recovery. These modes of alienation being by matter of record, and in actions or suits at law, which were pursued with the same form as if real, and were not to be presumed to be fictitious, would bar the issue in tail as privies in estate; and even as against the donor and his heirs, whose right in reversion would only arise upon failure of the issue in tail, would have a certain effect and operation, putting him to a remote and contingent remedy. The present statute only alludes to *finés*, not recoveries.

<sup>1</sup> These words are taken from the translation in our statute-book. In the other parts of the statute, I have strictly adhered to the original; and the language, for that reason, will be found to vary from the common translations. The reader who has passed through the former part of this history, instead of a *deed of gift*, he would expect to hear of a *charter of donation*, and so indeed it ought to be. That it is absolutely necessary to adhere to the language of the time, in pursuing an inquiry like this, every one must know. A curious observation in the next page, upon the construction of this statute, is

husband of such woman should not claim anything *per legem Angliæ*, in such conditional gift; nor the issue of such second husband claim anything by descent; but that immediately upon the death of a man and woman to whom land was so given, it should *revert* to their issue, or to the donor or his heir; so that the law, in this particular, as laid down both by Glanville and Bracton, was changed; and the opinion maintained by *Stephanus de Segrave* in the last reign was established.<sup>1</sup> These are the words of this famous law; the great object of which seems to have been to secure the then possessors of land in the power of making dispositions that were to endure to all eternity. The inclination showed by the courts to support the principle of this statute, and the construction they put upon it, soon promised to carry this intention into full effect.

The construction of the judges upon the wording and intention of this statute was, that the donee should no longer have a *fee conditional*, as before, but that the fee should be *entailé*, cut, or divided, and he should have a *feodum talliatum*. Indeed, this seems to have been foreseen by the makers of the act; for, in the same parliament, and before the statute could have been agitated in the courts of law, we find the term *feodum talliatum*<sup>2</sup> as expressing an estate then existing in the law (*a*). It ap-

(*a*) If land was given in tail, with warranty to donee, and his heirs, and assigns, and the donee aliened in fee and died without issue, the warranty would be a bar to a *formedon* for recovery by the recorder (*Year-Book*, 46 *Edw. III.*, 4). It was said that at common law, if land was given to a man and the heirs of his body, or heirs male of his body, if he had issue, then it was a fee simple, for it was a fee simple at common law, though otherwise, since the statute of Westminster 2, c. 1., and after issue had, the donee could at common law alien, but if he died without issue and had not aliened, then *formedon a reverter* lay (18 *Assize*, fol. 5). But after the statute, where the donee died without issue, and heir of the donor could recover (35 *Assize*, fol. 14), for it was adjudged an estate tail and not fee simple (*Ibid.*). So, since the statute, the donee in tail had not fee simple, *sicut habuit prius*, but the fee simple remained with donor (*Year-Book*, 5 *Hen. VII.*, 14). The effect of this statute may be explained thus by a case in the next reign. Before the statute, if tenant in tail made lease for life and then released, the issue would be bound in a writ of *formedon*; and so after the statute, where tenant founded entirely on the expression, and would have been lost, if the common translation had been followed. The reader should be apprised that, from the time of this king, a conflict will inevitably arise between the old and new language of the law, and the victory will in the end be decided in favor of the latter.

<sup>1</sup> *Vide ante*, c. v.

<sup>2</sup> Ch. 46.

pears, that very early after the statute the judges had gone a great way in pursuing its intention; for they not only cut a fee tail out of a fee simple, but they again divided the fee tail: as for instance, if a person took land by purchase to him and his wife, and to the issue begotten by them in lawful matrimony, nothing would here accrue to the purchasers but a freehold for their lives, and the *fee* to their issue: if they had no issue, the fee remained in the person of the donor till they had issue; and if the purchaser had no issue, or the issue failed, the land reverted to the donor.<sup>1</sup> In this construction they seemed entirely justified by the terms of the statute; for it speaks of the land not as *descending* to the issue, but as *remaining*<sup>2</sup> or *reverting*; and, notwithstanding the term *descendere* in the writ given by the act, it seems to consider the issue and the donor as in the same light. The numberless consequences which followed from the restriction imposed by this statute, furnish no small part of the discussion to which landed property afterwards became subject; as will be seen in the course of this history.

A remedy was ordained by this act for those who would avail themselves of the new regulation made by it. The following form of a writ was given: *Præcipe A. quod justè, etc., reddat B. manerium de F. cum suis pertinentiis, quòd C. dedit tali viro, et tali mulieri, et hæredibus de ipso viro et muliere exeuntibus, etc.* Or thus: *quòd C. dedit tali viro in liberum maritagium eum tali muliere, et quod post mortem prædictorum viri et mulieris, prædicto B. filio eorundem viri et mulieris descendere debeat per formam donationis prædictæ, ut dicit, etc.* Or thus: *quod C. dedit tali et hæredibus de corpore suo exeuntibus, et quod post mortem illius talis, prædicto B. filio prædicti talis descendere debeat per formam, etc.* The writ here given was the issue, and was in after-times called a *formedon in*

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in tail before the statute had made lease for life, and had then released his reversion in tail (*Year-Book*, 44 *Edw. III.*, fol. 3). There the issue in tail brought a writ of formedon, and it was pleaded that the ancestor before the statute, leased for life, and then released also before the statute. And it was adjudged that as the lease and release were before the statute, the issue in tail were barred, although it was argued that the fee simple did not pass as the reversion was in tail; it appears to have been held otherwise, but it was implied that it would not be so if the lease and release were after the statute (4 *B.*, 44 *Edw. III.*, fol. 3).

<sup>1</sup> Britt., fol. 93.

<sup>2</sup> An estate *ad remanentiam*, in Glanville, signifies an estate in fee. Lib. vii., c. 1.



*discender*. There was no writ of *formedon in reverter*, as it has since been called, given by the statute; the writ whereby the donor might recover when issue fails, (says the act) being common enough in the chancery; though there is no mention of such a writ in Bracton. Lest the efficacy allowed by the law to a fine should prejudice the provisions hereby ordained, it was declared, that if a fine was levied of lands given in the above form, *ipso jure sit nullus*,<sup>1</sup> it should be void; and their heirs, or those to whom the reversion belonged, though they were of full age, within England, and out of prison, should not be under necessity to make their claim.<sup>2</sup> This is the whole of the statute *de donis*, to which we shall have frequent occasion to recur in the course of this work.

It has been seen<sup>3</sup> how the administration of intestates' effects came into the hands of the ordinary, who was bound, however, to do such things as the executors would have been liable to had there been a will. It seems this part of his charge was not sufficiently considered by the bishop (a), and therefore the following declaration of the common law was made, namely, that the ordinary should be bound to answer the debts of the intestate, as far as the goods would go, in the same manner as the executors must have done.<sup>4</sup>

Executors could not, by the common law, have an action of account, for an account to be made to the testator, because an account was a matter that was considered as resting in privity between the two parties concerned: for

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(a) The author, it is conceived, had not rightly apprehended the reason for the enactment, which was, by making it a matter of common law, cognizance to apply the rules of the common law as to debts, the proof of debts, their discharge, and the like; as to which there were various differences between the common law and the civil or canon law. So long as the matter was entirely of ecclesiastical cognizance, the rules of the canon law would be followed; but the effect of the statute was to impose a *statutable* duty on the ordinary; the performance of which would then be enforced by the courts of common law, according to rules of the common law. As regards the duty to pay the just debts of the deceased, there was no difference between the canon law and the common law; but as to what *constituted* debts, or as to the proof of debts, or the discharge of debts, there would often be a difference, and there was no reason why there should be any difference between the liability of the executor and administrator.

<sup>1</sup> It may be worth remarking, that these very words are used by Bracton to express that a fine was void. *Vide* 256.

<sup>2</sup> Ch. 1. *Vide ante*.

<sup>3</sup> *Vide ante*.

<sup>4</sup> Ch. 29.

which reason it was ordained that, for the future, they should have a writ *de compoto*, with the same process as the deceased would have been entitled to.<sup>1</sup>

The remainder of this statute consists of improvements in the administration of justice. These were very numerous and important; the change in the order and course of judicature, which was the grand object of Edward's reformation in the law, being principally effected by this statute (*a*). These regulations divide themselves into such as concerned the jurisdiction of courts, and such as made any variation in the course of proceeding. We shall first speak of the former, in the order in which they were made.

The first of these relates to the proceedings at the  
Regulation of  
the eyre. eyre (*b*). There used to be proclamation made for the delivery of all writs by a certain day,

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(*a*) Not, as has already been seen, from any *regard* for justice (for there never was a more rapacious, unscrupulous, and arbitrary sovereign), but simply (as already explained) because, being a sagacious prince, he was wise enough to perceive that the administration of justice might be made a source of revenue. Hence his legislation was directed to the establishment of royal courts, with a regular judicature and regular procedure; and to the transfer of business as much as possible from the old local popular tribunals to these royal courts; the suits in which, by means of fees and fines, became a frightful source of profit to the crown. It is a curious and remarkable fact, that although the justices itinerant had been appointed to go circuits so long ago as the reign of Henry II. (or rather Henry I.), yet now we find under this king, justices in eyre, or of oyer and terminer, going only once in seven years. The reason has already elsewhere been mentioned and is indeed indicated by the chapters in Britton relating to the subject, that these justices in eyre applied themselves far more carefully to fines and forfeitures than the administration of justice, and were regarded more as oppressors than protectors; and hence it was desired that they should come only once in seven years. One great head of their inquiries, and that to which it is believed they applied themselves more closely than any other, was as to franchises; the assumption of which, without proof of legal title, exposed the party not only to forfeiture but fine. And every offence against the crown which would involve an amerciament or forfeiture was eagerly inquired into, as appears from several chapters in Britton. Hence it may easily be imagined that every possible excuse for non-attendance was taken advantage of.

(*b*) As to this in Britton's treatise, the king is represented as saying, "Et volons nous que justices errants, soient assignes oyer et terminer en chescun counte de vii. ans en vii. ans." . . . (fol. 1). And then there is a chapter, "De Eyres"—"Quant a nos venues et al eyres de nos justices, volons nous que general crie soit fait solempnement par les cytes et burghes par tout counte, que trestons les franks del counte et tous les mainpris del counte soient, a certain jour que contoigne xl. jours ou meyns devant nous ou ceux justices que serront nosmes en nostre maundement a eyrer en mesme counte, et tous ceux que aucune franchise cleymment en mesme counte soient mesme

<sup>1</sup> Ch. 23.

after which no writ was to be received. Suitors trusting to this used to depart, when, by some connivance, writs would be received in their absence, and they lost their land by default. To prevent this, it was ordained that the justices in their eyres should appoint a time of fifteen days, or a month, more or less, according to the size of the county, within which the sheriff was to certify the chief justice of eyre, how many and what writs he had, and none was to be received after that; but all process issuing upon writs received after that was to be null and void. However, to this there were made several exceptions; first, that writs abated might, during the whole eyre, be amended: secondly, that writs of dower of the seisin of men who died within the summons of the eyre,<sup>1</sup> assizes *ultimæ præsentationis*, writs of *quare impedit*, of churches vacant within the aforesaid summons, should be received at any time before the departure of the justices: and lastly, that all writs of novel disseisin, at what time soever the disseisin was done, should be received in the eyre.

This chapter makes a provision concerning the appointment of attorneys. At common law, the king might, by letters-patent, or by writ under his seal, grant to any demandant or plaintiff, tenant or defendant, to make his attorney in any action, and command the judges to admit such person to be attorney; but now, by this act, for the quiet and good of his subjects, the king *de speciali gratiâ* granted that such as had lands in several shires where the eyre was held, and had a suit there, and were apprehensive that they might be sued in some other county, as before the justices of the benches of Westminster, or the justices *ad capiendas assisas*, or in any county before the sheriff, or in a court baron, might make their *general attorney* to prosecute and defend suits for them in the eyre: which attorneys were to have authority to do all acts, till they were removed, and the plea determined; though they were not on that account to be excused from being put on juries and assizes before the justices.<sup>2</sup> By this

le jour davant nos ou les justices, et chescun monstre apertement, et des frischement par lettres queles franchises il clayme," etc.

<sup>1</sup> Lord Coke, 2 Inst., 377, construes *infra summonitionem itineris* to signify the space of forty days previous to the coming of the justices in eyre; but I am inclined to think it means, as in Bracton, the district within which the summons of the justices itinerant would run.

<sup>2</sup> Ch. 10.

parliamentary permission to make attorneys, the king gave up the fees that used to be paid for a special permission to appoint an attorney; and, in proportion, the carrying on a suit became less expensive and troublesome to the subject than it had been.<sup>1</sup>

The next provisions concerning judicature are c. 29 and 30. The former relates to justices *ad audiendum et terminandum*, or<sup>2</sup> of *oyer* and *terminer*, as they have since been usually called. Of these there is no mention in Bracton, though they are hinted at in a statute of the last reign (*a.*)

(*a.*) These commissions were substituted for the ancient commissions of the eyres or "itineras," and were in substance the same — the result being, when they became regular and settled by prescription and usage, to substitute our modern justices of assize for the old justices itinerant. The commission of oyer and terminer — a commission to "hear and determine," is in fact the most general form of a commission from the crown to administer justice; and it will comprise either civil or criminal matters. It, therefore, is the most comprehensive of the commissions under which judges of assize afterwards sat, and still continue to sit; and it is perhaps the most ancient kind of commission issued by the crown for the administration of justice. There is reason to believe that originally justice was administered under these general commissions very roughly and arbitrarily; but by degrees, as usage settled the general course of procedure all over the kingdom, that general course became established, as the course of the common law (though there were still variances of practice in the different counties), and a commission of oyer and terminer was understood to mean a commission to hear and determine according to the course of the common law. It is to be observed that in these commissions we see the earliest exercise and illustration of the great prerogative of the crown to administer justice; and it is only by usage or prescription that this prerogative is limited, apart from statute. It is not now (as Lord Coke says) competent to the crown to issue commissions, or to establish courts to administer justice in some new mode, except with the authority of parliament; because usage has long settled the terms and the import of these commissions. It has already been seen what, according to Bracton, were the commissions issued to the justices itinerant, which were substituted for those of the justices in eyre. As to these, it appears that their commissions were very general, and in that respect resembled commissions of oyer and terminer" (6 *Edw. II.*, *Bro. Abr.*, *Oyer and Terminer*, 91). Such commissions, before the present statute, could be issued to persons not lawyers or regular judges. Thus we find "a commission issued to Knevit, Thorpe, and Ludlow, knights, to hear and determine all manners of treasons, felonies, conspiracies, confederacies, damages, and grievances, done to the king and the people, whether at the suit of the king or of the party; and also of wards' marriages, escheats, and other things done to the king, in the counties of Essex, Hereford, Cambridge, Suffolk, and Norfolk, and by which they came to the hundred, and had their commissions read, and then called upon the bailiffs of each hundred, etc." (42 *Assize*, fol. 5). This is the course taken at this day, under the commissions of oyer and terminer at the assizes. The commissions issued out of Chancery, and were

<sup>1</sup> 2 *Inst.*, 378.

<sup>2</sup> It may be remarked that *Oydor*, from *Oyr*, to hear, in Spanish signifies a judge.

It was now enacted that a writ (for so commissions were called) *de transgressionem ad audiendum et terminandum*, for hearing and determining any outrage or misdemeanor (for *transgressio* is to be understood in a large sense) should not from thenceforth be granted before any justices, except justices of either bench and justices in eyre, *nisi pro enormi transgressionem*, unless in cases of particular enormity, where it was necessary to provide speedy remedy, and the king in his special grace should think fit to grant it; nor was a writ *ad audiendum et terminandum*, to hear appeals, to be granted but in special cases, and for certain causes, at the king's command. But, that such appellees might not be detained in prison an unreasonable time, they were to have their writ *de odio et atia*, as ordained by *Magna Charta*.<sup>1</sup> It should seem, from the manner in which the writ of *oyer* and *terminer* is here spoken of, that it was usually issued at the suit and prayer of some person, and was not a general commission, like that of gaol-delivery; it used also, one should think, to be directed to private persons, whose names were inserted by the direction of the party suing it out. A writ of *oyer* and *terminer* might be superseded under this statute, *quia non enormis transgressio*, etc.

This is followed by the statute of *nisi prius*, as it has since been called. It will be unnecessary to recapitulate the account formerly given and so frequently recurred to, of the order of judicature, both as it stood at common law, and as it was altered by *Magna Charta*, and subsequent usage<sup>2</sup> (a). In further reformation thereof, the following regulation was now made.

Justices of  
*nisi prius*.

returned there; and, if required, sent into the king's bench (44 *Edw. III.*, c. xliii. and xxxi.). If the commissions expired or were discontinued, the commissions came into the king's bench, as the supreme criminal court of the realm (*Ibid.*); and process would issue out of that high court if necessary (*Ibid.*). It was always held that justices, i. e., judges of assize, could not be made, except by commission (*Mirror of Justice*; *Year-Book*, 5 *Edw. IV.*, 3).

(a) Except to observe that ordinarily, and apart from statutable regulation, a cause would be tried in the court in which it was brought, and thus, if an action were brought in the *curia regis*, the parties upon appearance would commence their pleading (which was by parol), and when this came to an issue, that issue would be tried in the same court, and might be tried at once. But as by *Magna Charta* common pleas, i. e., pleas (or suits) between party and party, could not follow the person of the king, but must be brought in a court fixed in some place, which, by usage, was at Westminster, it followed that, except as to courts of assize, etc. (as to which there was a special clause, that they should be tried in their counties), all causes in the superior courts

<sup>1</sup> Ch. 29. *Vide ante*, c. v.

<sup>2</sup> *Ibid.*

It was ordained, in the first place, that there should be assigned two justices sworn, before whom, and them only, should be taken all assizes of novel disseisin, mortuance, and attaints (*a*). These justices were to associate to themselves one or two of the discreetest knights of the county into which they came, and to take the before-mentioned assizes and attaints, at most, three times in the year; that is, between the *quindena* of St. John the Baptist and the yule of August, that is, the feast of St. Peter *ad vincula*, being the first of August; then between the feast of the exaltation of the holy cross, that is, the fourteenth of September, and the octave of St. Michael; then between the Epiphany, that is, the sixth of January, and the feast of the Purification of the blessed Mary.<sup>1</sup> These justices were, in every county, before their departure, to appoint the day of their return, that every one might know of their next coming: they were to adjourn assizes from term to term, if the taking of them was deferred by

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could be tried at Westminster. The inconvenience of this would be manifest, and led to the practice of sending the records of the cases for trial into the counties where they arose. It seems that, notwithstanding Magna Charta, suits between party and party still continued to be brought in the king's bench. "Assize was taken in *banco regis* in Suffolk, and then the court was removed to Westminster, and yet the court proceeded and awarded the assize, and tried the issue by *nisi prius* in Suffolk" (19 *Assize*, fol. 4). So again, if assize was taken in *banco regis* in the county where the court sat, and before it was determined, the court was removed into another county, yet the assize should not cease, but be tried at *nisi prius*; notwithstanding the statute (Magna Charta), which said that assizes should be taken in their proper counties (15 *Assize*, fol. 5). And if an assize was brought in the common bench, of land in Middlesex, and the court was removed, the issue should be tried at *nisi prius*, and it was a case out of the statute (8 *Edw. IV.*, 16).

(*a*) Commenting on this, Brooke says, "Note, that by the statute of Westminster 2, c. 30, two justices can take an assize, and try issues of *nisi prius*, of pleas (or suits) in either bench (*i. e.*, in the king's bench or common bench), unless it was a matter of great weight (*nisi magna indigiat examinatio*), and then it should be determined in *banco*, unless both parties prayed that it should be before two justices of the court, or one justice and one knight. And the statute *De finibus* is to the same effect, and so the statute of York, save that it may be before one justice of the place where the plea is, associating to him one prudent man, etc. And by the statute of 2 Edward III., c. 19, a *nisi prius* can be granted in a plea of land, as well at the prayer of the demandant as of the tenant, according to the statute of York. And by the statute 14 Edw. III., c. 15, *nisi prius* can be taken before two, so that one shall be a justice of one of the benches, or the chief baron, or a sergeant-at-law, etc." (*Bro. Abr., Nisi Prius*, 37).

<sup>1</sup> For these feasts and seasons, and the relation they bore to the terms, *vide ante*, c. viii., p. 318, the scheme of *dies communes in banco*.

vouching to warranty, by essoin, or by default of recognitors: and if they saw it would be proper for assizes of mortancestor, when respited by essoin or voucher, to be adjourned into the bench, they were to send the record with the original writ before the justices of the bench; and when the plea had proceeded as far as to the caption of the assize, then the justices of the bench were to remand the record, with the original writ, back to the former justices, before whom the assize should be taken. It was ordained, that the justices of the bench should give four days, at least, in the year in assizes of the above kind, before the said justices assigned, in order to spare expense and trouble.

Thus far the statute provides concerning assizes, which was nothing more than a modification of the institution of justices of assize by *Magna Charta*. It then goes on thus: Besides the above, inquisitions to be taken of trespasses which were in suit before the justices of both benches (unless it was an enormous trespass that required a more<sup>1</sup> solemn inquiry) were to be determined before these justices; as were also inquisitions arising in other pleas depending in both benches, where the issue was of easy examination; as an entry or seisin; or any one single point which was to be tried. But it ordains, that inquests, where great and numerous points were to be tried, which required much examination, should be taken before the justices of the bench, unless both parties joined in praying that the inquest might be taken before *aliquibus de societate*, some associated in the commission, *cum in partes illas venerint*; which, however, was never to be done in future but by two justices, or one justice, together with a knight of the county, who should be agreed upon by the parties.

To carry the provision of this act into execution, it was moreover ordained, that no inquest should be taken before any of the justices of the bench, unless a certain day and place was appointed in the county, in presence of the parties, and the day and place inserted in a judicial writ, in these words: *Præcipimus tibi, quod venire facias coram justitiariis nostris apud Westm. in octabis sancti Michaelis, nisi talis et talis tali die et loco ad partes illas venerint, duodecim, etc. (a).*

(a) Originally, it is to be observed, an action was triable only in the court where it was brought. It was provided by *Magna Charta* that assizes of

<sup>1</sup> *Vide ante, c. iii.*

Thus the inquest was to be taken at Westminster only upon failure of its being taken in the county; and the trial in the county was in later times, from the clause in the writ, said to be at *nisi prius*; though in the above *venire* given by the statute, the word *prius* is not inserted, as it now is, and indeed usually was at that time; for this clause of *nisi*, or *nisi prius*, was not a new thing. In the reign of Henry III., when it seemed to be arbitrary and promiscuous whether certain writs should be tried at Westminster or in the eyre, we find some of them had this clause *NISI justitiarum PRIUS ad partes illas venerint*,<sup>1</sup> etc.

Inquests taken in this manner were to be returned into the bench, where judgment was to be given, and the inquest enrolled; and inquests taken otherwise than in the above way were to be held void, except that assizes of *darrein presentment*, and inquests of *quare impedit*, should be determined in their own county, before one justice of the bench and one knight, at a day and place certain appointed in the bench, whether the defendants consented or not; and there the judgment was to be given immediately. It was further directed, that all justices of the benches in their itinera should have clerks to enroll pleas pleaded before them, as they had been used in time past. It was ordained that justices assigned to take assizes should not compel jurors to say precisely whether it was

novel disseisin and mort d'ancestor, the most common remedies at that time, should, instead of being tried at Westminster, in the superior court, i. e., of common pleas, in which they were brought (the charter making that court fixed at Westminster, by enacting that common pleas or suits should not follow the king), be taken in their proper counties, and for this purpose justices were to be sent into every county once a year, to take these assizes there. These local trials being found very convenient, it was decreed the system should be applied, not only to assizes, but to other actions; and it is thus provided in the above statute that the juries should be summoned at Westminster only in the event of the trial not previously taking place in the county where the action arose. The *venire* or court to summon the juries was under the statute framed in this form: "Præcipimus tibi, quod venire facias coram justitiariis nostris apud Westm., nisi talis et talis tali die et loco ad partes illas venerint, duodecim," etc. This *nisi prius* clause was until lately retained in the proceedings of record; and it is the above enactment expressed by a subsequent one (14 *Edu. II.*, c. 16) which authorizes at the present day a trial before the justices of assize when of the superior court, and gives it the name of a trial at *nisi prius*; though in reality the enactment as well as the form are obsolete, because the trials now, by reason of the rules as to *venire*, must take place in the county appointed for the trial, which is (unless changed by order of the court) the county where the matter arose.

<sup>1</sup> *Vide ante*, c. viii.



disseisin or not, so as they showed the truth of the fact, and prayed the assistance of the justices; if they, however, of their own accord would say generally, that it was or was not disseisin, their verdict was to be taken at their peril (a).<sup>1</sup>

(a) This reign was the era at which trial by jury became firmly established, and therefore all that related to it became of great importance; and accordingly we find, in this reign, legislation on every part of it, from the summoning of jurors to their final verdict. Further on, will be found a statute as to the qualifications of jurors; and there is the enactment as to bills of exceptions, to which the present is introductory. Britton, who wrote in this reign, enters fully into the whole system of trial by jury. He speaks of challenges, and the impanelling of twelve jurors, who are to be sworn to speak the truth upon the issue, and the justice is to inform them of the nature of the question, and the allegations on each side, though nothing is said of evidence offered to the jurors; for at this time they gave their verdicts on their own knowledge, and thereupon they are to go by themselves and consider the matter; and if they cannot agree, others are to be added. "Et si ils ne purront accorder, soient autres mys en la plus forte partie des jurors, si les parties le vouillent, et si non, soit juge encontre celui que ne le voudera" (330). And if the jury could not give any verdict at all, the plaintiff failed. There were many modes of trial; and from various parts of Britton, it appears that the general principle was this, that if the matter, from its nature, *might* be in the knowledge of others, at all events, of neighbors, the proper course was trial by jury. In cases from their nature secret, and between the parties, as in most cases of debt, wager of law was allowed, *i. e.*, trial on the oath of the defendant and compurgators. This was derived from the ancient Saxon system of compurgators—the origin of trial by jurors; for the difference between the compurgators and jurors was only this, at first, that the former swore to their belief, from their knowledge of the defendant, and jurors gave their verdicts on their belief, of their own knowledge, as to the facts of the case. Hence wager of law was allowed in cases where, from their nature, jurors could not have knowledge. Thus, under the head of debt, Britton enters fully into the course of procedure, and describes when it shall be wager of law and when trial by jury: "Et si il tende taille ou suyt et la suyte soit trouve accordaunte, adonques purra il defendre la det par sa ley;" whence it appears, that "the suit," or "secta," meant the compurgators, with whom the defendant waged his law, *i. e.*, denied the debt upon oath. So the defendant might declare the deed not to be his, because he had lost his seal, and had made public outcry about it at the time. "Et sur ceo soit enquys la vente par la visne ou la fait duist estre fait et solone le verdit du pays soit celui que serra trouve mentour juge a la prison et puny par fyn." Whence it appears, that if the matter pleaded was one which, in its nature, would be within the knowledge of the county or vicinage, it would be tried by the jury *per patriam*. "Et si le fait ne fuit mye fait les nostre poer si que la vente ne purra estre enquys par nous, soit la prouve abounde ou pleyntyfe, essent que si il passe aver par bons tesmoynes les contractes, soit juge pur le pleyntyfe: et celes *exceptiones* eyent lieu en nostre court devant nos justices car en countes ne en autres petites courts, ne port nul home foreyn contractes prover sil soit dedit." Whence the advantage of suing in the king's court is pointed out, in that it had a general jurisdiction. If the debtor could not deny his debt, he was to be mulct in debt and damages, and to make satisfaction to the plaintiff and to the king, by amercement for his wrongful detention of the debt. The chapter concludes by stating, that other personal

<sup>1</sup> Ch. 30.

This caution seems to have been in affirmance of the com-

actions could be brought before the sheriff by writ of *justicies*, as covenant or account, or detention of deeds, etc., and of nuisances, "que voillent estre pledes par destresse de chateux et par damages, et termines *par jures*." If, on a trial by jury, they could not say one way or the other, the plaintiff failed, as it was for him to prove his case. "Et si les jurours ne sevent veut pronuncier la vente ne rien del fait, si remeyne la seisin al tenaint, et le plaintiff en la mercy, pour ceo que il n'ad mye prouve sa entente et sa pleynte" (330). It was only in case of wilful and perverse misconduct on the part of the jurors that they were to be coerced by starvation into a verdict. "Et si ils ne voillent le verdict pronuncier en ceo cas pour favour de une des parties ou pur autre enchesun, donques soient, en fermes sauns manger et sauns beyver si la que ils eyent lour verdit prononcere." Upon their verdict followed judgment, unless there was any reason for doubt. This is treated of under the next head — judgement: "Come ils serront de un accord, tauntost voysent a la barre devaunt les justices, a doner lour verdit, et solone lour verdit soit jugement rendu pour un des parties si nul doute ne soit ne nul difficulte par quoy mester soit de examiner par les jurours ou par autres ou de delayer jugement jesque a en autre jour issent que en le mien temps pussent les justices estre assise, et conseilles quo est soit mieux a faire; si les justices nequedent en verdirs soient dotous, et ces jurours ne sout suffisament examines et sorent a les trop avaunt en jugement par les reason de ascune mot ou de ascune reson que puit aver et double entendement en tiels cas tient lieu cele certification par mesure les justices ou par autres. Mes plus sure est as justices d'examiner biens les resons des jurours essent que ils pussent rendre bon jugement et seyn." And if the verdict was for the plaintiff (in disseisin, for instance), it was to be enforced if he had claimed too much; and if so, he was to be amerced for his excessive claim: "En tiel cas il est amerceable pour sa outrance demaunde" (334). Then follows what is very characteristic of the age. It is to be observed, that the system of trial by jury, in its infancy, viz., that the jurors gave their verdicts of their own knowledge, was a cause of constant difficulty, because, although in very early times, when transactions were few, simple, and open (as feoffments, with livery of seisin, or contracts of sale in markets, and the like), the jurors, coming from the vill, might have knowledge of them; it was otherwise as population increased, and men's affairs grew more numerous, and, from their nature, often secret; as, for instance, private contracts or conveyances. In such cases, the jurors would often be entirely at fault, knowing nothing of the matter; and hence, by degrees, the necessity for hearing *evidence* of sworn witnesses was recognized. But this was only gradually and partially established, and in the meantime much difficulty was often met with, which was dealt with in the way described by Britton: by examination of the jurors, or addition to the jury, until they were agreed. Another mode resorted to was that of returning a special verdict upon the facts *proved*, which relieved the jury of responsibility, both as to the facts and the law. As to the facts, they were liable to attain for a false verdict; and they were often in this difficulty, that they did not and could not know the truth of a fact from their own knowledge; and yet it was not *given in evidence*, one way or the other; and so, if they did not find it, they might be liable, if it was a fact of an open nature, such as a feoffment; and yet, if they *did* find it, having no evidence of it, their verdict might be false; and they be liable to an attain. Hence, in such cases, the common law allowed them to give their verdict specially, by setting forth the *facts proved* before them; and thus they escaped the difficulty as to facts of which they could and could not take cognizance without actual evidence, and at the same time also avoided any difficulty as to matters of law, by referring

mon law (a), and was inserted only to guard jurors from being driven into the danger of an attain<sup>t</sup>.<sup>1</sup>

This was the manner in which the old appointment of justices was reformed, and that of justices of *nisi prius*, as they were called in after times, was first made. This latter received afterwards several alterations; some of which were made in this reign. As these contribute to show the history of this important improvement in our judicial polity, it will be proper to mention them now, and bring the whole of this subject into one point of view. It seems, the justices of gaol-delivery, either <sup>Justices of gaol-delivery.</sup> not returning so frequent into the country as was to be wished, or the persons filling that office not executing it as they ought, it was enacted by stat. 27 Edward I., stat. 1, c. iii., that justices assigned to take assizes in every county, after the assizes so taken, should remain together, if they were laymen; and if one of them was a clerk (which was very often the case), then one of the discreeter knights of the county being associated with him who was a layman, they two by the king's writ should deliver the county gaol, as well within liberties as without, as had been done in gaol-deliveries formerly, and then proceed to make inquiry of, and punish sheriffs for breaches of the statute 3 Edward I., c. xv., concerning bail and mainprise. Thus were justices of assize and *nisi prius* constituted also justices of gaol-delivery.

The times for taking inquests, and the persons who were qualified to be justices of *nisi prius*, were altered by the next chapter of this act, in the following way. Inquests and recognitions determinable before justices of either bench, were by this new law to be taken in time of vacation, before any justice of the same bench where the suit depended, to whom was to be associated one knight in the county where the inquest was taken; though in this, as in the former act, there was an exception of inquests that

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the matter to the court, who gave judgment on the special verdict, and then the verdict became that of the court; for the judgment went on *their view* of the facts, not on the view of the jury (43 *Assize*, 41; 38 *Assize*, fol. 9; 29 *Assize*, fol. 40; 21 *Assize*, fol. 28; 43 *Assize*, fol. 1). Thus, therefore, special verdicts, as Lord Coke says, arose at common law; and the present statute only protected the right of the jurors to give such verdicts.

(a) This, in the statute, comes immediately before the chapter as to bills of exception, *vide post*, where it is noticed in that, its proper place.

<sup>1</sup> *Vide ante*, c. ix., etc.

required great examination. This statute further empowered the justices, in taking inquests, to do that which appeared to them most expedient for the good of the realm, *non obstante* the statute of *nisi prius*.<sup>1</sup>

Further, by the statute *for persons appealed*, 28 Edward I., stat. 2, it was ordained, that where such justices assigned to take assizes and deliver gaols, found any provors in the gaol, the sheriff of the county where the persons appealed were resident should be commanded by the king's writ, upon testimony of such justices, to take the persons appealed, and bring them before the justices, where they should answer. If they would put themselves *super patriam*, the justices were to issue a judicial writ to the sheriff of the county where the felony was committed, *quod venire faciat* an inquest of the county, to appear before the justices of the place where the provor was then detained.

Thus stood the jurisdiction of these justices at the end of this reign. This institution was found to be a great improvement on the eyre; and, as it received several alterations in the two following reigns to render it still more beneficial and convenient, it soon made that ancient establishment less necessary, and by degrees wholly superseded it. The variety in the taking of inquests, sometimes *in banco*, and sometimes in the country, as was the practice in the last reign, no longer subsisted;<sup>2</sup> but the whole was reduced to one uniform system.

While the superior tribunals were thus ascertained, the excesses committed by inferior courts in extending their jurisdiction, were repressed by an act<sup>3</sup> which gave treble damages against sheriffs, and other bailiffs or lords, who procured suits to be maliciously brought against persons, without any cause of action, in the county hundred, and other courts. Among other regulations about inferior jurisdictions, a check was imposed upon the judicial authority assumed by certain persons appointed by the Hospitallers and Templars to be their *conservatores privilegiorum*: these were enjoined not to presume to entertain suits of matters belonging to the king's court.<sup>4</sup>

Thus far were provisions made for ascertaining the bounds of judicature, and securing a regular access to

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<sup>1</sup> Ch. 4.    <sup>2</sup> *Vide ante*, c. viii.    <sup>3</sup> Ch. 36.    <sup>4</sup> Ch. 43.    *Vide ante*, c. ix.

courts of different kinds. There were many alterations made in the old remedies, which tended to render the former method of proceeding more easy and effectual. Others, wholly of a new kind, were contrived for ordering a course of redress in cases not already provided for: these consisted chiefly in new writs, upon which real actions were founded, applicable to various purposes. We shall first speak of the improvement made in the remedies at common law, and then of those that were entirely new.

The next chapter to that, *De donis conditionalibus*, provides a remedy in three cases of suits, *de vetito namio*, which were thought great grievances. Of replevin.

When a lord distrained for services, and the tenant replevied either with writ or without, and upon the plaint being made in the county or other inferior court having jurisdiction *de vetito namio*, he avowed the taking to be lawful and just, the tenant might, as we have seen, disclaim any tenure between them; whereupon, as the county could not try the tenure, there was an end of the suit, as far as it could be maintained in that court, and the distrainer would be *in misericordiâ*, and it was not in the power of the court to inflict any penalty on the tenant for disclaiming the tenure.<sup>1</sup> This was one defect, which it was intended to remedy by the following provision. It was ordained that, in future, where lords could not, in the like case, obtain justice against their tenants in the county or other inferior court, they might, as soon as they had been attached, have a writ *ad ponendam loquelam coram justitiariis*, before whom alone justice could be substantially done to such lords; and in the writ of *pone* was to be inserted this clause of removal, *Quia talis distrinxit in fœdo suo pro servitiis, et consuetudinibus sibi debitis, etc.* This allowance of a *pone* to the defendant, says the statute, is no prejudice to the rule of the common law, that forbids<sup>2</sup> any suit *poni coram justitiariis* at the motion and prayer of a defendant; for though, at first sight, the tenant seems to be the plaintiff, and the lord defendant, yet, when it is considered that the lord has distrained, and sues for his services and customs in arrear, he appears rather in the light of a plaintiff. As a rule to the justices to know on

<sup>1</sup> *Vide ante*, c. viii.

<sup>2</sup> *Ibid.*

what seisin a lord should be permitted to avow a distress upon his tenant, it was agreed and enacted, that a distress should lie of seisin of a man's ancestor or predecessor, *à tempore* that a writ of novel disseisin would run.

A second inconvenience in cases of distress, was, that after replevying his cattle, the tenant would sell or *eloin* them, as it was called, so as effectually to prevent their being returned to the lord, if the judgment of the court happened to be for a return. To remedy this it was provided, that, in future, the sheriff or his bailiff should, before he made delivery of the cattle, take not only pledges *de proseguendo*, as had been always usual (and indeed the proceeding was thence called *replegiare*), but also pledges *de averiis retornandis*, for the returning the cattle, if a return should be adjudged. If pledges were taken in any other way than this, the person taking them was to answer himself for the value of the cattle; and the lord might have a writ against him, *quòd reddat ei tot averia*, or *tot cattalla* (a), if the bailiff could not make the amends, his principal was to be liable.

A third inconvenience was, that when a return of the cattle was adjudged to the distrainor, the tenant would again replevy them; but when the lord appeared in court, he would make default, and consequently a return of the cattle would again be adjudged to the lord; and so it might happen several times, to the harassing of the lord, and the utter contempt of the king's court. To remedy this, it was ordained, that, after judgment for return of the cattle, the sheriff should be commanded by a judicial writ, *quòd returnum habere faciat de averiis*, and therein should be inserted a clause, commanding him not to deliver them again without a writ making mention of the judgment passed by the justices (which could not be but by a writ issuing out of the rolls of the justices before whom the plea was depending); and when the tenant applied to the justices in such case for a new replevin of his cattle, it was to be by a judicial writ commanding the sheriff, *quòd captâ securitate de proseguendo, et etiam de averiis* (or *cattallis*) *retornandis, vel eorum pretio, si returnum adjudi-*

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(a) Upon this it was held that if the sheriff took *insufficient* pledges he was liable as though he had taken no pledges; a remarkable instance of judicial construction of a statute according to its object and spirit (*Year-Book*, 2 *Hen. VI.*, 15).

*cetur, etc.*, since called a writ of *second deliverance*. Upon this the sheriff was to make deliverance of the cattle that were returned; and to attach the distrainer to appear on a certain day before the justices, where the plea was to be heard. If the person replevying should make default, or a return should on any other account be adjudged, in this second replevin, the distress was ever after to remain *irreplevisable*; saving, however, a new distress for any new cause.<sup>1</sup> The writ of *second deliverance* is similar to one of the same kind used in Bracton's time,<sup>2</sup> called a *second caption*, though that was, as it should seem, an original writ. Indeed, there is no mention in Bracton of any decisive effect that writ of *second caption* had, more than the writ of replevin; and the making the cattle *irreplevisable* seems entirely a regulation of this statute.

The proceeding against accountants was rendered more strict in all cases of servants, bailiffs, chamberlains, and all manner of receivers who were Of accountants. bound *ad compotum reddendum* (a). It was ordained,<sup>3</sup> that when the lord of servants of that kind assigned them *auditores compoti*, auditors of account, and they were found in arrears, their bodies should be arrested, and they should be sent, on testimony of such auditors, and delivered to the next gaol of the king in those parts, there to be kept by the sheriff or gaoler *in ferries, et sub bonâ custodiâ*, at their own expense, till they satisfied all arrears. If a person so delivered to custody should complain that the auditors had charged him with receipts which never came to his hands, and had not allowed him reasonable dis-

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(a) By the statutes there was a *capias ad computandum*, an arrest, to compel the party to account, and if he would not account he was condemned in the whole amount of the receipts (*Year-Book*, 41 *Edw. III.*, fol. 3). And the auditors could commit the party to prison (45 *Edw. IV.*, fol. 14), that is, to compel payment of the arrears; but this imprisonment, which was for a specific time, was no satisfaction of the debt, for which the plaintiff could still sue to execution (27 *Hen. VI.*, 8). It was a cumulative or additional remedy which was thus provided by the statute, in favor especially of mercantile debts. After arrest the account was taken, and the certificate of the auditors filed in the court (21 *Hen. VI.*, 26). In the *Mirror* this statute is objected to on several grounds, that it gives the remedy only to the master; and that auditors are assigned without the assent of the servant; that the auditors are not bound to allow anything but at their pleasure without punishment; that recovery is ordained against the servant, and not the surety or the goods; and that there was no check or control on the auditors (*Mirror*, c. v., s. 2).

<sup>1</sup> Ch. 2.

<sup>2</sup> *Vide ante*, c. viii.

<sup>3</sup> Ch. 11.

bursements, and could find friends who would become *manu captors* for him, and undertake to bring him before the barons of the exchequer, he was to be delivered to them. Further, the sheriff, who had custody of him, was to *scire facias* the lord to appear at a certain day before the barons of the exchequer, with his rolls and tallies by which he made his account; and in the presence of the barons, or auditors whom they should assign, the account was to be rehearsed, and justice done between the parties. If the receiver should be found in arrears, he was to be sent to the Fleet Prison.<sup>1</sup> Upon this clause was framed the writ called *ex parte talis*, for the person imprisoned to bring the inquiry before the court of exchequer.

Thus far of a particular method of proceeding with accountants. It was further ordained generally, in like cases of account, that if the accountant fled, and would not come to account, he was, according to the statute of Marlbridge,<sup>2</sup> to be distrained, if he had anything whereof distress could be made, *ad veniendum corum justiciariis ad compotum suum reddendum*; and if upon appearing he was found in arrear, and could not pay, he was to be committed to gaol, as before-mentioned. If he fled, and it was certified by the sheriff that he was *non inventus*, he was to be demanded<sup>3</sup> from county to county, till he was outlawed. It was moreover declared, that persons imprisoned for such matter should not be replevisable, and the sheriff was enjoined not to permit them to go at large, either upon a writ of *replegiare* or otherwise, without the assent of the lord, on pain of answering to him for the damages he had sustained by such servants, according to the amount he could make out *per patriam*, to be recovered in an action of debt. If the gaoler could not make amends himself, his principal was to be liable (*a*). Thus was the

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(a) Upon this a liberal construction was placed which very much enlarged the scope of the enactment. It was held that by the equity of the statute debt should be against the gaoler upon judgment in any other action in case of an escape out of custody (*Year-Book*, 15 *Edw. IV.*, 20). This is a remarkable illustration of the principle often laid down in the construction of these ancient statutes, viz., that remedial statutes are to be construed as largely as possible so as to extend them to all cases within "the mischief." Thus it was laid down that a statute made for common remedy for a general mischief shall be taken by equity (*Year-Book*, 11 *Hen. IV.*, 76). Thus the statute of 9 *Edw. III.*, c. v., said that the executor who first came by distress

<sup>1</sup> Gaola de Fleta (21 *Hen. VI.*, 26). <sup>2</sup> *Vide ante*, c. viii. <sup>3</sup> *Exigatur*.



process in an action of account become more effectual. We have before noticed that this action was allowed to executors by another chapter of this statute.<sup>1</sup>

A notion it seems had prevailed, that the old writ *de prohibitione vasti*,<sup>2</sup> which issued in cases of waste, required the parties to answer only for waste done subsequent to the writ. To prevent this mistake, this writ of prohibition was wholly taken away by statute;<sup>3</sup> and there was substituted in its place, in all cases of waste, a writ of summons; by which the party complained of was to be summoned to answer for waste done at any time. If he did not appear upon the summons, he was to be attached, and, after the attachment, distrained; and if he did not appear after the distress, the sheriff was to be commanded, *quod assumptis secum duodecim, etc., in propria personâ*, he should go to the place wasted, and make inquiry of the waste, and return the inquisition; and upon that inquisition they were to proceed to judgment, as directed by the first statute of Westminster, ch. 21.<sup>4</sup> It was in another chapter<sup>5</sup> ordained, that when two or more had a wood, a turbary, a fishery, or the like, in common, in which neither knew what was his several right, and one of them committed waste against the will of the others, in such case an action of waste should lie; and the defendant, when judgment was to pass, should have his election to take his share in a certain part to be assigned by the sheriff, and the view of his neighbors chosen and sworn for this purpose; or to take nothing in future from the said common but what his parceners would allow. If he chose to take his share, it was to be allotted him in the place wasted. The writ in this case begun, *Cum A. et B. teneant boscum pro indiviso, B. fecit vastum, etc.*

In favor of infants it was provided, that if they were eloiigned, and so prevented from appearing in person, their next friends might be admitted to sue for them in all cases where the infants could maintain an action.<sup>6</sup> The eloiignment has been considered only as an instance

should answer, and it was applied to him who first came by *capias*, *quod nota et hoc videtur per un equitie* (24 Edw. III., 48). (So on the statute West. 1, c. xxxix.; 40 Assize, fol. 2. So 7 Hen. VI., 7, and 3 Hen. VII., 2.)

<sup>1</sup> Vide ante, c. ix.

<sup>3</sup> Ch. 14.

<sup>5</sup> Ch. 22.

<sup>2</sup> Ibid., c. vi.

<sup>4</sup> Vide ante, c. ix.

<sup>6</sup> Ch. 15.

stated for an example, and the statute has always been construed as giving a permission in all cases for infants to appear by their next friend; which, however, is nothing more than a confirmation of the common law.

Several regulations were made respecting process. Sheriffs used to appoint bailiffs to make distresses, who were not known to be regular officers.

This was sometimes done in order to tempt persons to make resistance, and incur the penalty of contempt of the law. Thus was it made the means of extortion; but to prevent it in future it was ordained, that distresses should not be made but by the bailiffs sworn and known; and that persons convicted of distraining otherwise, should restore damages to the party grieved in an action of trespass, and also be punished as for an offence against the king.<sup>1</sup>

The execution of process by sheriffs was regulated by another chapter.<sup>2</sup> The course of justice was much impeded by the neglect of sheriffs in making return of writs, and in making false returns. To avoid such obstacles to justice, if possible, it was directed, that persons who apprehended the negligence of sheriffs, should deliver their writs *in pleno commitatû*, or *in retro commitatû*, as it was called (which it seems was a continuation of the county court, after the hearing of causes, for collecting the king's money and other business), and that a billet should be taken from the sheriff, or under-sheriff, containing the names of the plaintiff and defendant in the writ, with the day on which the writ was delivered, and that at his request the seal of the sheriff or under-sheriff should be affixed in testimony thereof; but if the seal was refused, the testimony of knights and other credible persons present was to be taken, and their seal affixed. After this, if the sheriff did not return the writ, and complaint was made thereof to the justices, a judicial writ was to go to the justices of assize, to make inquiry, by those who were present at the delivery of the writ, what they knew of the delivery; and if it appeared upon return of such inquiry, that the writ was delivered, damages were to be adjudged to the party grieved, in proportion to the subject of the action, and the inconvenience incurred. The

<sup>1</sup> Ch. 37.

<sup>2</sup> Ch. 39.

same course was also to be taken when the sheriff returned, that the writ came too late to be executed.

Sheriffs sometimes returned, *mandavi ballivo*, that they had commanded the bailiff of a certain liberty, who had done nothing therein; and then they would name some liberty, which, in truth, had no return of writs. To correct this, it was ordained that the treasurer and barons of the exchequer should deliver to the justices a roll of all the liberties, in every county, that had the return of writs. If a sheriff returned that he commanded the bailiff of a liberty not contained in that roll, he was punished as a disseisor, says the statute, of the king. But if he returned that he had commanded the bailiff of some liberty inserted therein, he was then commanded, *quod non omittas propter, predictam libertatem*, but to execute the writ, *scire facias* the bailiffs to appear, and say why they did not execute the king's writ. If they came and acquitted themselves, by saying they were not required so to do, the sheriff was to be condemned both to the lord of the liberty and to the party to the suit, who had suffered by the delay. If the bailiffs did not appear at the day, or did not on their appearance acquit themselves in the above way, in every subsequent judicial writ, through the whole action, there was to be the same cause of *non omittas*.

Another instance in which sheriffs frequently failed, was in executing the clause *de exitibus, etc.*, for levying issues; sometimes returning that there were none, or small; and sometimes saying nothing at all of issues. To such return, therefore, it was now ordained, the plaintiff might *offerat verificare* that the sheriff could answer for larger issues; upon which a judicial writ was to go to the justices of assize to make inquiry, in presence of the sheriff, if he pleased to be there, for what issues he could answer, from the date of the writ to the return; and if it was proved that he had not answered for the whole, he was to be estreated into the exchequer for the overplus, and, besides, was to be amerced for the concealment. The sheriff was also enjoined by this statute to consider all rents, corn in the grange, and all movables (except the furniture of horses and household utensils) as *issues*. Sheriffs were to be punished for their first and second offences by the justices of assize; but for the third, only *coram rege*.

It was commanded, that sheriffs should never in future

return, that they were prevented from executing a writ by the interference and resistance of some potent lord, as this was a disgrace to the king's authority and crown; and whenever a sheriff was informed by his bailiffs that such resistance was made, he was to proceed immediately with the *posse comitatûs* to support him in executing the king's command. If it was proved to be false, he was immediately to commit the bailiffs to prison; if true, he was to do the same with the offenders, who should not be delivered without the special command of the king. If he was still resisted, he was to certify to the court the names of the resisters, with those who were aiding, consenting, commanding, and favoring them; who were to be attached *per corpora* by a judicial writ to appear *coram rege*; and if they were convicted, they were to be punished at the pleasure of the king.

Another complaint against sheriffs, hundredors, and bailiffs of liberties was, that they put infirm persons, and those who lived out of the country, upon juries; and summoned a greater number than was necessary, only to get money for dispensing with their attendance; so that, after all, assizes and juries very frequently would not be taken for want of jurors. It was therefore ordained,<sup>1</sup> that in one assize no more should be summoned than twenty-four; and that old men above seventy, those who were incurably ill, or at the time of the summons were ill, or not resident in the country, should not in future be put on juries, or lesser assizes; nor any one who had not some freehold of the value of twenty shillings per annum, within the county where the assize or jury was to be taken, or of forty shillings without it; unless they were witnesses to charters or other writings, whose presence was absolutely necessary (a). As to great assizes,

(a) The remedy of the party at the trial was challenged; and in Britton there is a chapter on "De chalenge de jurors," in which the various grounds of challenge are enumerated, on conviction of any infamous offence: "Ne ceux que ne ount point descretion ne eux que sont excommenges ne mese ans de commune gents outer, ne prestres ne clers dedens seynt ordres ne femmes ne ceux que sont passes le age de lxx. ans, ne villayns ne ceux que a ascun des partres sent destreyrables, ou seignour, ou conseillers, ou countours" (pleaders). Want of proper qualification has always been deemed a ground for challenge. From this time there was a long series of statutes on the subject, until they were all consolidated in the jury act, 6 Geo. IV., c. 60.

<sup>1</sup> Ch. 38.

where, on account of the small number of knights, it might be inconvenient to affix any such qualification, it would be sufficient if they had freehold of any value in the county. If any officer offended against this act, he was to answer in damages to the party grieved, and be amerced to the king by the justices of assize, who were to hear complaints on this statute. The qualifications of jurors were altered by the statute *de iis qui ponendi in assisis*, 21 Edw. I., st. 1, which requires those who were on juries out of their counties (which was the case in trials at the bar of the courts at Westminster) to have land or tenements of one hundred shillings per annum, and those within the county of forty shillings; those before justices assigned, or other ministers of the king, appointed to take inquests, juries, or other recognitions, forty shillings per annum; but as to those before the justices itinerant, and in cities, boroughs, and other mercantile towns, they were to remain as at common law. Respecting jurors in general, it was enacted by statute *articuli super chartas*, 28 Edw. I., c. 9, that such persons should be put on inquests and juries as were next neighbors; those who were most sufficient, and least suspicious; under pain of paying double damages to the party complaining, and being amerced to the king.

To return to the statute of Westmin. 2. Some further regulations were made for the forwarding of suits; these we shall proceed to mention. As the law now stood, a warrantor, if, upon denying the warranty, it was found against him, suffered no other penalty but an amercement, and being obliged to warrant;<sup>1</sup> but it was now thought proper to make the warrantor, in such case, lose his land, as the tenant would; and further, to prevent collusion and delay, it was provided, that where the tenant and warrantor were at issue, the demandant might pray a *venire facias*, to try the matter.<sup>2</sup> We have seen what great delay was occasioned by the essoin *de malo lecti*. To prevent the long and tedious course of ascertaining the truth of this essoin by the writ *de faciendo videre*,<sup>3</sup> it was now provided,<sup>4</sup> that the party might, in the iter of justices (which has been extended by construction to the common pleas), take issue whether *languidus* or not; and if it was found against the essoin, that it should

Of essoins.

<sup>1</sup> *Vide ante*, c. vii.

<sup>2</sup> Ch. 6.

<sup>3</sup> *Vide ante*, c. vii.

<sup>4</sup> Ch. 17.

be turned to a default. This *essoin de malo lecti* was wholly taken away in a writ of right between two claiming by the same descent; as between parceners. It had been enacted by statute Marl., c. 13,<sup>1</sup> that after a person had put himself on an inquest he should have only one *essoin*; but this is not limiting at what precise stage he should have that *essoin*, and as defendants would sometimes take it upon the writ of *habeas corpora juratorum*, the consequence was, that the jurors lost their issues, and the inquest was not taken; it was therefore (principally for the ease of jurors) now provided,<sup>2</sup> that the *essoin* should be taken at the next day; which must be upon the *venire facias*, and not after (*a*). This alteration, like that of the statute of Marlbridge, which it was meant to amend, has been construed to relate only to personal actions. Again, as at common law, no *essoin* was to be allowed, where a day was given *prece partium*, and the parties agreed to come without an *essoin*.<sup>3</sup> Again, whereas by the statute Westmin. 1<sup>4</sup> an *essoin* was taken from the tenant in certain assizes, after appearance, it was now in like cases to be taken from the demandant.<sup>5</sup>

The view, which likewise created much delay in real actions, was dispensed with in some instances. It was ordained,<sup>6</sup> that where land was lost by default, and the loser brought a new action; and where a writ was abated by a dilatory exception, after a view, as by non-tenure, or misnaming of the place; no view should be granted in a second action. In the following cases there was to be no view at all: in a writ of dower, where the land was aliened to the tenant and his ancestor, for he could not but know the land himself; in a writ of entry, after a former writ quashed for assigning the entry wrong, in which there had been a view; and in all writs grounded upon a demise to the tenant himself from the plaintiff or

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(a) Upon this it was laid down that a statute must have a reasonable construction, and though the statute said, that after any one had put himself in any inquisition, the next day should be allowed to have an *essoin*, yet to him who came by the *exigent* or *cape corpus*, and joined issue, there should not be an *essoin*, for he should remain in custody, or be released on mainprise, and so was present in court (*Year-Book*, 35 *Hen. VI.*, 53).

<sup>1</sup> *Vide ante*, c. viii.

<sup>2</sup> Ch. 27.

<sup>3</sup> At common law, an *essoin* was allowed on a day given *prece partium*; but not if expressly given *sine essionio*. Compare *ante*, c. vii.

<sup>4</sup> *Viz.*, ch. 42. *Vide ante*, c. ix.

<sup>5</sup> Ch. 28.

<sup>6</sup> Ch. 48.

his ancestors, *dum fuit infra ætatem, non compos, in prisonâ*, and the like. In these provisions, the legislature seems to have acted upon the principles which governed on this subject, in the latter reign.<sup>1</sup>

The other improvements made in the administration of justice were of a more striking nature than those that have just been mentioned, and claim a more particular regard; such as an execution given against land by *elegit*; the introduction of bills of exception; and the proceeding by *scire facias* to revive a judgment of a year's standing. These we shall speak of first, as more worthy the consideration of a modern reader. The remainder of this statute relates to the real remedies so much practised in those days, and which we have reserved to be thrown together at the conclusion of these provisions for the better administration of civil justice.

Both Glanville and Bracton pass over personal actions so slightly as to give us no information concerning the execution that might be had thereon. We have seen that there was a process against the chattels and the land also to compel an appearance,<sup>2</sup> and in cases of outlawry, both might be taken; but it does not appear that the land, like the goods, was ever sold, or delivered to the plaintiff in satisfaction of his debt (*a*). It was only in real actions

(*a*) In the *Mirror* it is stated, that in personal actions on defaults, defendants were distrained to the value of the demand; and for default after default judgment was given for the plaintiff; and that if the defendant had land, he should not be arrested, but the judgment by default was in force, and the plaintiff should have the land to hold until satisfaction was made (c. iv., s. 5), and so on in real actions the land was to be adjudged to the plaintiff to hold as a distress (c. vii.). It is plain that it was so, either on default before judgment or after judgment, whether by default or otherwise. The land was looked upon as the real security, and it was only held to enforce appearance, or, after judgment, to enforce payment. So as to mixed actions, which included debt and contract, the defendants were distrainable by all their goods and lands, till they appeared and answered; and the issues (of the lands) came to the profit of the lord of the court (s. 8). Thus the seizure was only as a mode of coercion, there was no power to sell the goods any more than to sell the land. It is manifest it was the same after judgment as before. Nothing is said in the *Mirror* as to execution in the sense of an actual levy of the money. The plaintiff only had power to seize and hold land and goods as a distress, and at common law a distress could not be sold. There was coercion, but not execution, at common law, save in actions for assault or injury to the person, when arrest was allowed on mesne process, and therefore on final process or execution. For the rule seems always to have been that the process allowed on default before judgment, was allowed upon default after

<sup>1</sup> *Vide ante*, c. vii.

<sup>2</sup> *Ibid.*

that the land was taken; except, indeed, in the cases provided for by the late statute *de mercatoribus*.<sup>1</sup> But now it was enacted as follows: that when a debt was recovered or acknowledged, or damages adjudged, in the king's court, the plaintiff should have his election either to have a writ *quodd vicecomis FIERI FACIAS*<sup>2</sup> *de terris et catallis*; or one commanding, *quodd vicecomes liberet ei omnia catalla debitoris (exceptis bobus, et affris carucæ), ET MEDIETATEM TERRÆ SUÆ, quousq; debitum fuerit levatum, per rationabile pretium, vel extentam*. The statute ordained, that if a person was ejected from a freehold so delivered to him, he should have his writ of novel disseisin, and redisseisin, if necessary.<sup>3</sup> Upon this there was framed a writ of execution, called

Writ of *elegit*.

an *elegit*, from the words of the statute; and if a plaintiff or conusee prayed this writ, the entry on the roll was, *quodd ELEGIT sibi executionem fieri de omnibus catallis, et medietate terræ, etc.*, and the writ was, *ac cum idem H. juxta statutum inde editum ELEGERIT SIBI LIBERARI pro prædictis 20 libris omnia catalla, et medietatem terræ ipsius R., etc.*<sup>4</sup> Thus was land made directly liable to answer for debts, contrary to the general policy of the feudal institution. We have seen, that in the case of a merchant, lands of a particular kind might be taken in exe-

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judgment; for non-payment of the debt, or non-render of the property in dispute, was in fact a default. Then the present statute gave the plaintiff his option or election, either to have the land to hold, as before, and levy the debt out of the profits, or to levy it on the goods; and it should seem that it was not intended that the creditor should have both, even in succession, so as to enable him to resort to one to remedy the deficiency of the other. That has been by usage. And see *Bracton*, lib. v., fol. 440.

<sup>1</sup> *Vide ante*, c. ix.

<sup>2</sup> The common language of our law-books has been, that the writs of *levari facias* and *fieri facias* were at the common law. Considering the silence of Glanville and Bracton about execution in personal actions, there is no direct authority either to contradict or support that opinion. It seems, however, doubtful whether those writs *eo nomine* are of such ancient date; and it is not improbable that the latter might have obtained both its name and existence from the words of this act. From the mere penning of the statute, the *fieri facias* appears as much a new regulation as the *medietatem terræ*. It is probable that the *distingas per terras et catalla*, which was the mesne process in personal actions, was the process of execution likewise. The legislature seem to have an eye to this process in the terms *de terris et catallis*. But the writ of *fieri facias*, properly so called, never contained anything *de terris*. This defect is supplied by the *levari facias*. Thus these two writs reach all the objects that could be touched by the old process of *distingas*; and were with that view, perhaps, framed after this act, if not upon the authority of it. *Vide ante*, c. viii.

<sup>3</sup> Ch. 18.

<sup>4</sup> 2 Inst., 395.



cution; but after this general authority had been given to take lands by writ of *elegit*, the merchant's security was enlarged still further by the second statute on that subject; so that the whole of a man's land was made liable to a statute-merchant, while only half could be taken by *elegit*.

The reasons for ordaining<sup>1</sup> a *bill of exceptions* was this: a writ of error might be had, whenever there was error on the record. But it sometimes happened, that the parties might allege matter of exception *ore tenus* in court, as the method was in these days, which the justices would overrule (a); and matter that was so overruled, as it was never

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(a) The previous clause or chapter throws great light upon the real meaning of the present, as to bills of exception. That clause provided that judges should not force jurors to a general verdict, or one precise to the point, but that jurors might return a special verdict, setting forth the facts for the judgment of the court: "Justiciarii non compellant juratores dicere præcise se sit disseisina vel non, dummodo dicere voluerint veritatem facti et petere auxilium justiciariorum." Upon which Lord Coke said: "It hath been resolved that in *all* actions, personal, real, or mixed, and upon all issues joined, general or special, the jury might find the special matter of fact pertinent, and tending only to the issue joined; and thereupon pray the discretion of the court for the law, and this the jurors might do at the common law, not only in cases between party and party, whereof the act putteth an example of the assize, but also in pleas of the crown at the king's suit. And note," he says, "the next clause of the act in affirmance also of the common law." The next clause is as to bills of exception: "Cum aliquis implacitatus proponat exceptionem et petat quod justiciarius eam allocent, quam si allocari noluerint, si ille qui exceptionem proposuerit scribat illam exceptionem, justiciarii apponent sigilla sua," etc. Upon which Lord Coke says: "At the common law, before the enacting of the act, a man might have had a writ of error for an error in law, in *redditione judicii*, in *redditione executionis*, or in *processu*, and this error in law must be apparent in the record; for the writ of error saith: *Quia in recordo*, etc., error interveniet manifestus. Or for error in fact, by alleging matter out of record, as death of either party before judgment. Now, the mischief was, that when the party did offer to allege any exception, and the justice overruled it, so as it was not entered of record; this the party could not assign for error, because it did not appear upon the record, nor was error in fact but error in law" (2 *Inst.*, 426). It is, however, to be observed that a party might demur upon the evidence, and on such demurrer bring error; that being in effect an excep-

<sup>1</sup> It appears from the following case, that a *bill* was a mandate of an authority inferior to that of a *writ*. In 8 Edw. II., upon an issue whether ancient demesne or not, a *bill* sealed with the seal of one of the justices of the bench was sent to the treasurer and barons of the exchequer to certify the court of the fact; but they paid no regard to the mandate, as it was only a *bill*; and therefore the same justice sent a writ, returnable in the bench at a general return day. *Mayn.* 277. [The author failed to observe that a bill was not mandatory, as a *writ* is. A bill was rather in the nature of a complaint; hence the process in the king's bench was by bill, in the nature of a petition or original writ. *Bro. Abr.*, "*Bill*," c. xii.]

entered upon the record, could not be assigned for error. It was therefore now provided<sup>1</sup> as follows: that where

tion allowed, for if the exception or demurrer were disallowed, it would not be entered of record, and then the evidence would not be entered of record; but if it were so, then the other party, the party demurred against, might bring error, if it was ultimately allowed by the bill court (2 *Rolle's Reports*, 117; *Baker's Case*, *Cro. Eliz.*, 753; *Wright v. Pendar*, *Al.*, 18; *Cockridge v. Fanshawe*, *Dougl.*, 119; *Rastall's Entries*, *tit. Demurrer*, *Scholastica's Case*, *Plowd.*, 405), the evidence being entered on the record, and the demurrer or exception thereto, that is, that it was not sufficient to maintain the issue incumbent on the party offering it. If such demurrer was received, and entered with the evidence, then the exception was so far allowed at *nisi prius* as to be entered of record, and thus to admit of a writ of error. So, again, if the jurors returned a special verdict, setting forth all the facts. But if this was not done, and the judge would not receive and record the "exception," whether in the form of a demurrer to the whole of the evidence, or of objection to the admissibility of any part of it, or otherwise, then there was a necessity for the power given by this statute, enabling the party excepting himself to write down the exception, and making it imperative on the judge to seal it, and return it as part of the record. Such was the scope of the statute which turns on the term "exception." There is nothing in which the influence and effect of usage, in controlling and determining the operation of our more ancient statutes, has been more marked or manifest than in regard to this subject of bills of exception. It is not too much to say, perhaps, that the modern notion of it is just the opposite of its ancient sense and meaning. To begin, what is now understood as the "exception" is always to the ruling of the judge, whereas, in the original meaning of the phrase, it was always applied to an objection to the case of the opposite party. This is the sense in which the term was used in Bracton's *Treatise*, written not long before the statute passed, and in which it was evidently borrowed from the phrase "exceptio," in the Roman law. The last book is entirely occupied with the subject, and is entitled "*De exceptionibus*." And it treats of exceptions thus: "*In primis videndum quid sit exceptio, et sciendum quod exceptio est actionis elisio, per quam actio perimitur, vel differtur.*" Then there follows an elaborate disquisition on the nature of exceptions, which comprehends all the objections that could be made to actions. For example, "*Exceptio de defectu probationis, per lapsum temporis*," etc. (fol. 437). "*Excepere etiam poterit tenens contra petentem quod licet jus ei descenderit sicut petens dicit, tamen non valet petitio sua nec actio pro defectu probationis*" (fol. 438). Thus it was always; the "exception" was against the case on the other side, and usually was against the case for the plaintiff, or it was some answer to it, as, for instance, the party sued might except to the case that it was *res judicata*, "*Item competit tenenti exceptio rei judicate ut si antecessor petentis rem petitam amiserit per judicium . . . hæc omnia probari possunt per rotulos et recorda justitarii*" (fol. 436). So that the "exception" might be one grounded on matter of fact, which required proof; and hence Bracton says that if it failed in proof, the party bringing it forward would lose judgment, "*Si quis autem in probatione exceptionis defecerit, amittet per judicium*" (fol. 401). And thus, therefore, the exception would always be directed against the case on the other side, and the justices would have to determine upon it; and either party—the party excepting, or the party excepted against—might have reason to be dissatisfied with the ruling, either for or against the exception, as the case might be. But as error only lay on matter

<sup>1</sup> Ch. 31.

any one was impleaded before the justices, and proposed any exception, and prayed it might be allowed, but the

of record, the result was that whether the exception were regarded or overruled, neither party could appeal against the ruling beyond the court where it was pronounced. The terms of the statute, it will be observed, applied only to the case of an exception disallowed; but according to the usual mode of construing ancient statutes, it was construed largely and liberally, as applying equally to either class of cases, that is, to exceptions allowed or disallowed. Still, it was understood in ancient times that the appeal was on the ruling or decision upon an exception to the case of the opposite party, though it might be to the sufficiency of the proof. The term "bill" used in the statute was the phrase used for a statement of a cause of complaint. Hence it was the form of process in the king's bench; "a man shall have bill *in banco regis*," etc. (*Year-Book*, 7 *Henry VI.*, 41); "bill of debt, by which J. S. petit de B.," etc. So the phrase, "bill in chancery" (2 *Richard III.*, 12). In one of the earlier *Year-Books* it is laid down that the order of exceptions was—1. To the jurisdiction; 2. To the person; 3. To the court; 4. To the writ; and, lastly, to the action (17 *Edw. III.*, 74; 19 *Henry VI.*, 10). Britton treats carefully of various kinds of "exceptions," as also does Bracton; and some of these exceptions were such as could be taken at the trial, being to the sufficiency or admissibility of evidence to sustain the issue. The making of an exception, however, did not necessarily raise a question as to the whole of the evidence, and that was the object of a special verdict. It should be observed that the present enactment was confined to cases of *exceptions*; and though this might include cases where the exception was to the whole case on the other side, for insufficiency to maintain the issue, and in such cases the whole of the evidence would be put on the record and brought before the court of error, yet it might be only an exception to part of the case, and it could not apply to cases where there was evidence on both sides, and where the question could not be raised in the form of an exception to the case on one side, the object being to obtain the judgment of the court upon the *whole* of the facts. Thus in such cases the course of the common law presented the procedure by special verdict, already provided for in the previous enactment above-mentioned. That, however, being a rather formal, prolix kind of proceeding, the practice of the courts very soon provided another, less formal and more convenient; and the simple proceeding by special case, in which, on a point reserved at the trial, the counsel stated the case at the bar, and obtained the opinion of the court thereon. The *Year-Books* are full of cases in which it is said that counsel "vient al barre," and stated such and such facts, and prayed the opinion of the court thereon. This was a "special case." In more modern times the "special case" was more frequently stated in writing, especially—and, indeed, necessarily so—if the question arose on documents; and the reports of Salkeld contain as many special cases as special verdicts. After this statute, as before, the course taken when it was desired to have the judgment of the court upon all the facts, was to have them set forth in a special verdict, or, as they said, "at large" (*Year-Book*, 41 *Edw. III.*, fol. 10; 30 *Edw. III.*, fol. 23). And upon the doubt as to the law, the case would be adjourned to Westminster, where the opinion of the court would be taken (43 *Assize*, fol. 1); and then, if necessary, the case could be taken to error, as the special verdict set out the facts at large upon the record. But if the parties were satisfied with the decision of the court in which the action was brought, the case need go no further; so in effect it was a reservation of the case for the judgment of the court. If the jurors were in doubt, they could find the facts at large, and put the matter in the discretion of the court (38 *Assize*, fol. 9; 43 *Assize*, fol. 41; 29 *Assize*, fol. 40).

justices would not allow it; then he might write down the exception, and pray the justices to put their seals to it, which they should do; and if one refused, another might do it. If, after this, the king, upon complaint of what the justices had done, caused the record to come before him, and that exception was not found therein, and the complainant showed it written down, with the seal of the justice appendant, then the justice should be commanded to appear at a certain day to acknowledge or deny his seal; and if it was not denied, then they were to proceed and determine whether that exception ought to have been refused or not (a). After this statute it should seem

There is reason to believe that the practice upon this ancient statute has hardly been appreciated in modern times, when it has been supposed that the practice of special cases—at all events in error—was entirely of modern origin. On the contrary, it is believed it arose out of the ancient practice *before* the statute. It is manifest that it assumes a power in the justices to enter the facts upon the record, for it provides a remedy for the party if they refuse to do so; and the whole scope of the statute confirms the view of Lord Coke, that it was declaratory of the common law. So, again, the practice of demurrer to evidence, which assumes that the facts are entered on record, implies a power in the court so to enter the facts. And it is believed that, looking at the numerous cases in the Year-Books of cases stated at the bar, many of them in courts of error, the practice of entering the facts on record, by way of special case, was even more ancient than the statute, and was confirmed by it. Any exception to the proceedings could be made the subject of a bill of exceptions; for instance, a challenge to a juror, if it were not allowed, the party challenging could have his bill of exceptions upon it, according to the statute, and upon that could have a writ of error (21 *Edw. IV.*, fol. 3). Or it might be an exception to any part of the case on the other side; and it should seem that whether the exception was allowed or overruled, it might be the subject of a bill of exceptions; for in one case the exception to a part of the defendant's case being *allowed*, he prayed that it might be entered on the record; and this being refused, he was told to make a "bill" of it, and they would seal it (*Year-Book*, 2 *Edw. IV.*, fol. 7). In the reign of Henry VI. an exception was taken in a case of *formedon*; and the judge (Martin, J.) seems to have treated it roughly. "*Quid ad hoc*," said he. He overruled it, upon which the counsel prayed that it might be entered; but Martin, J., said, "Make your bill of exceptions, and we will seal it; for it shall not be entered on the rolls, to encumber the rolls," etc. "*Quod nota*," says the reporter (4 *Henry VI.*, fol. 15). If there be any matter of law that carries with it any difficulty, the jury may, to deliver themselves from the danger of an attain, find it specially, that so it may be decided in that court where the verdict is returnable; and if the judge overrule the point of law contrary to the law, whereby the jury are persuaded to find a general verdict (which yet they are not bound to do, if they doubt it), then the judge, upon the request of the party desiring it, is bound by law, in convenient time, to seal a bill of exceptions containing the whole matter excepted to, so that the party grieved by such indiscretion or error of the judge, may have relief by the writ of error or the statute of Westminster (*Hale's Hist. Com. Law*, c. xii.).

(a) The statute can scarcely be understood without some explanation. The

that most points of law, whether upon the record or not, might be re-examined in a writ of error.

The nature of the provision about a *scire facias* on a judgment cannot be better understood than from a rehearsal of the statute itself. Be- *Scire facias.*  
cause, says the act,<sup>1</sup> where a matter is recorded before the chancellor and the king's justices of record, and enrolled in their rolls, there ought not to be thereon the common process of an action, by summons, attachment, essoin, view of land, and other solemnities of proceeding that are usual in cases of contracts and covenants made out of court; therefore, for the future, all things enrolled in a court of record, or contained in fines (*a*), whether they are con-

principle of the common law was that a party sued must have notice or warning to defend himself, and as therefore he had the notice by summons in every action, so after judgment he ought to have it whenever there had either been a change of parties, such as might afford ground for some exception, or a lapse of time during which such a change of parties might have taken place; and the common law rule fixed this at a year and a day; after which execution could not be taken out on a judgment without a *scire facias*. Upon this principle also, when it was sought to charge a person upon some obligation or judgment to which he was not a party, but by which he was under a legal liability, as in the case of change of parties, by death, the common law required that he should have notice of the proceeding, and thus be made in some way a party to it, so far as to give him an opportunity of showing cause against his enforced liability to it, and also against the tenants of any lands bound thereby. And on an inquisition or an *elegit*, strangers, even tenants, would not be bound, as they would be if these made parties by *scire facias*. Thus, if a man be bounden in a recognizance, though the recognizee die, his executors cannot sue forth an *elegit* to have execution of the recognizance even within the year, without suing forth a *scire facias* against the recognizer. And if the recognizer be dead, then the recognizee or his executors must sue a *scire facias* against the heir of the recognizer, and against those who are tenants (*i. e.*, freehold) of the lands which he had (*Fitzherbert's Natura Brevium*, 267; *Year-Book*, 38 *Edw. III.*, 13; 46 *Edw. III.*, c. 29; 2 *Rich. III.*, 8). The *scire facias*, so called from the principal words in it, directed the sheriff to make them to know, *i. e.*, to give notice to them, "to show if they have anything to say for themselves why the land which they hold ought not to be delivered, etc." (*Ibid.*). Where, however, the parties, on either side, had not died, *scire facias* was not necessary, except to the tenants of the freehold, for they would be thereby bound. The inquisition in *elegit* would be an *ex parte* inquiry whether the recognizer or judgment debtor was seized of the lands. If this was falsely found, and any one else was seized, he could not be bound by the inquisition, unless he had previously been made party by *scire facias*, in which he could have shown that the recognizer was not seized of the land. Lord Coke and Lord Hale thought *scire facias* lay in all actions at common law, *vide Salkeld*.

(a) One important application of this enactment related to the execution of fines, which in this age were used as records of titles and limitations of estates. The statute *De donis* shows, by its concluding enactment, prohibiting the use

<sup>1</sup> Ch. 45.

tracts, covenants, obligations, services, customs, recognizances, or whatever they may be, if enrolled; and such a

of fines for the purpose of barring estates tail, that they were used for that purpose. After that statute, recoveries were used for the purpose of alienation or alteration of estates; and fines appear to have been used rather for the purpose of creating and transferring and recording titles to land, and especially for recording the successive limitations of estates; and on these estates vesting, the fine could under the enactment be summarily executed without putting the party to the delay of a real action. Before the statute by which *scire facias* was granted to have execution, the party to a fine had no other remedy, but the writ *de fine facto*, and that was nothing but a writ of covenant (*Year-Book*, 43 *Edw. III.*, fol. 13). As before the statute, the writ *de fine facto* lay to have execution by action on the covenant; now the writ of *scire facias* lay to give a more direct and summary remedy by way of execution, without a new action (*Ibid.*); and though it was in the nature of a new action, yet the onus lay on the defendant of showing, by some matter subsequent to the fine, why it should not be carried into execution. The writ or declaration in *scire facias*, which of course set out the fine, could be objected or demurred to on the ground that it did not set forth a fine which would warrant the execution required; but if there was no objection to it in law, then execution was at once awarded (*Ibid.*). The advantage of this system — of a permanent record of titles, and a simple and summary remedy for recovery of land — can be readily understood, and in such an age must have been very great. The reports and records of subsequent reigns contain entries showing that fines were thus used for the purpose of creating and recording titles, at least as early as the time of Henry III., for fines of that reign are to be found mentioned which had evidently been used for that purpose, and the Year-Books of the ensuing reigns are full of cases of *scire facias* upon fines. Thus, in the 40 *Edw. III.*, fol. 19, there was *scire facias* brought upon a fine by the Duke of Lancaster and Blanche, his wife. If indeed the title did not really depend upon the fine, but on a prior title, the party was left to his real action (41 *Edw. III.*, 21). And the writ could be had upon a fine with several limitations; for it was said before the statute, a party could have had the writ *De fine facto*, which was in its nature a writ of covenant, and although different estates were granted by the fine, one writ would have lain upon them, for that they were all in one fine; and so it was with the writ of *scire facias* under the statute (43 *Edw. III.*, fol. 23). So *scire facias* lay to execute a remainder on a fine (44 *Edw. III.*, fol. 39), or reversion after death of tenant for life (44 *Edw. III.*, fol. 39), or it lay for the issue in tail (42 *Edw. III.*, fol. 5), for that it was inconvenient that he should be put to the delay of his writ of formedon (*Ibid.*). And upon the *scire facias* there could be no objection taken, unless that the parties to the fine had no estate of freehold. The statutes as to fines, indeed (18 *Edw. I.*, and 27 *Edw. I.*), declared that fines should bind not only parties and privies, but strangers, and that no allegation against them should be permitted; but, nevertheless, the courts allowed strangers to show that the parties to the fine had no freehold estate (40 *Edw. III.*, fol. 32; 42 *Edw. III.*, fol. 20), and even the heir of the party acknowledging could show that he himself or his ancestor had continued seized (46 *Edw. III.*, fol. 14). A fine was effectual, however, if either of the parties were seized at the time the fine was levied (41 *Edw. III.*, fol. 14). If that were so, *scire facias* would lie to execute it, unless some special matter which had occurred could be shown to avoid it (50 *Edw. III.*, fol. 22). It is manifest that this permanent record of titles, and this speedy and summary remedy for the recovery of land, must have been of great importance in such an age.

matter to which the king's court might, by the law and custom of the realm, give the authority of a record, shall have such consideration and sanction, as for it not to be needful to make them again the subject of regular action and pleading; that is, by summons, attachment, and so on, as above-mentioned. But when complaint shall be made thereon to the court, and the acknowledgments or *fine* is a recent one, that is, within a year, then a writ of execution shall be had; but if it is of longer date, the sheriff shall be commanded, *quodd scire facias*, the party of whom the complaint is, to appear at a certain day, and show cause why what was contained in the roll or the fine should not be executed. If the party appeared not, or could say nothing why execution should not be had, the sheriff was to be commanded to do execution thereof. It should seem that this statute, from the mention of contracts, covenants, and the like, first gave a *scire facias* in personal actions (that writ being, as we have seen, not uncommonly used in real actions); and that before this act it had been usual to bring a fresh action upon the judgment (*a*).

We come now to the additions which this statute made to the number of real remedies before in use. These we shall speak of nearly in the order in which they were made. The first provision of this kind was in favor of a wife whose husband held land in her right. We have before seen, that where a husband *aliened* a freehold that he had in right of his wife, she, after his death, might have a writ of entry, since called a *cui in vitâ*, to recover it back again.<sup>1</sup> It seemed hard, that when a husband had

(*a*) Upon this an important principle was laid down, that when an act of parliament is made in the affirmative, it does not take away a prior remedy. Thus the common law (it was said), was, that if a man recovered debt or damages, and did not sue execution within the year, he was put to a new action, for no *scire facias* at common law in such case; and the statute Westminster 2, c. xlv., gave *scire facias*, but as it was in the affirmative, that the party might have *scire facias*, it was held not to take away the writ of debt, and the party could have writ of debt after the year, as at common law; and so an action of debt was held to lie on a recognizance, and the party was not driven to a *scire facias* (36 Hen. VI., 3). The same principle was laid down—upon the precedent afforded by this statute—in other cases (42 Assize, 22). But statutes in the negative were deemed to alter the common law, so that a man could not afterwards resort to the common law, but then it was always also held that statutes which restrained the common law should be strictly construed (10 Edw. IV., 7; 18 Edw. IV., 16).

<sup>1</sup> *Vide ante*, c. vi.

lost such land by *default*, the wife, after his death, should not have the same remedy, but was to be driven to bring a writ of right. It was therefore ordained,<sup>1</sup> that in such case the woman should have a writ of entry, *cui ipsa in vita sua contradicere non potuit*; which should be conducted in the following way: If the tenant pleaded against the demand of the wife, that he entered by judgment, and it turned out to have been by default, then he was to answer over to the title under which he claimed upon the first writ brought against the husband and wife; and if he could make out none, it was ordained that the woman should recover, notwithstanding the default (*a*). Again, if a husband refused to defend an action brought for the wife's land, she might, upon her prayer, be received to defend her right.<sup>2</sup>

In like manner, when a tenant in dower, or *per legem Angliæ*, or otherwise for term of life, or by any gift where the reversion was reserved, made default, the heirs, and those entitled to the reversion, were to be received to answer, if they came before judgment (*b*); and if judgment

(a) Note, by the statute Westminster, c. iii., that where the baron (husband) made default in return, that the wife should be re seized; and the same statute, c. xxv., says that if any one on assize vouched a record and failed, that he should be deemed a disseisor without recognition of assize; and yet in assize against husband and wife, who vouched record and failed, so that at the day the husband made default, the wife should be re seized. And so (it was said) where there are two statutes made together, the one contrary to the other, a reasonable construction shall be made (*Year-Book, 7 Hen. IV., 16*). A principle extremely useful, and of very general application. It is to be observed that each chapter of the statute is deemed a distinct act, the statute in those ancient times meaning rather a session, or all the statutes passed in a session or parliament.

(b) This deserves attention, as affording an illustration of the tenacity of legal principles, and an instance of the existence of a procedure founded on a certain principle substantially the same, during the course of six centuries. At the common law, as already seen when considering the first statute of Westminster (*vide ante*), when a party was sued in a real action, he could "vouch," as the phrase was, the warranty of some one else from whom he had derived title, and who had undertaken to uphold it, and could summon him to come in as a party to the suit. And when the party vouched that the vouchee came forward and appeared, he was made defendant in place of the tenant, and the suit went on. There was an enactment in the first statute of Westminster, as we have seen, directed to this procedure, which was thus explained by Lord Coke: "In ancient times," he says, quoting the *Mirror*, "it seemed strange that, when the original *præcipe* was brought against the tenant of the land, that the court, upon that original, should hold plea between the tenant and the vouchee; but it is more strange to make a question of that

<sup>1</sup> Ch. 3.

<sup>2</sup> *Vide ante*, c. ix., as to the first law for receipt.



had been passed, either by default or reddition, then, after the death of such tenant, they might have a writ of entry with like process as that above mentioned.

Where a person aliened any land held in right of his wife, it was ordained<sup>1</sup> that, after the death of the husband, the woman or her heir should not be delayed by the nonage of the heir who ought to warrant; but a purchaser was to stay till the age of his warrantor before he should avail himself of his warranty, for he could not be ignorant that he was purchasing the right of another person, and therefore deserved no favor.

Further provision was made in cases of dower. It was declared,<sup>2</sup> consistently with what the law had uniformly pronounced,<sup>3</sup> that where a husband, being impleaded, had given up the land demanded to his adversary *de plano*, that is, by a regular judicial surrender, the justices, upon a writ of dower, should adjudge the wife her dower. But where the land was lost by default, there was a difference of opinion, some justices holding that the widow was, in such case, entitled to dower, others that she was

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which hath received an ancient, continual, and constant allowance. The vouchee cometh in *in loco tenentis*, and in judgment of law, is a tenant to the demandant. And on a similar principle, by the common law, a party in reversion could claim to come forward to defend his title, and the enactment is to carry that act; the former being to enable the tenant to defend himself, the present for the protection of the reversioner. This being the law in real actions, when the action of ejectment superseded, then the same principle was applied to that action, and, by the practice of the courts, the tenant could virtually "vouch" his landlord by letting judgment go by default, unless he appeared, and the landlord was allowed to come in to defend. See Salkeld's *Reports*, title "*Ejectment*" (*Salk.*, 257). Then the practice was established by statute 11 Geo. II., c. xix., s. 11-13, and Lord Mansfield, in a case on that statute, said, "In all real actions at common law, before the statute of Westminster, wherever tenant of the freehold made default, the reversioner or remainderman had a right to come in and defend the possession, because, if judgment was had against the tenant in possession, it turned the estate of those behind to a right. This is, however, expressly allowed by the statute Westm. 2, c. iii. It never could be a doubt whether, before the act, a landlord should be admitted to defend when the tenant refused. It is strange that two acts of parliament at five hundred years' distance, viz., Westm. 2 and 11 Geo. II., both upon the same point, should be made, as introductory to a new law which was provided for by the common law long before" (1 *Wm. Blackstone's Rep.*, 361). It is true this was said of the provision in the second statute of Westm. as to allowing the owner to come in, but it is obvious that the tenant's power of letting judgment go by default would virtually operate to compel the landlord to come in, unless he was willing to allow the claimant to recover.

<sup>1</sup> Ch. 40.

<sup>2</sup> Ch. 4.

<sup>3</sup> *Vide* vol. i., c. iii.

not<sup>1</sup> (a). To remove this doubt, it was now declared that a woman claiming her dower should be heard in this case, as in the former; and if it was objected to her that her husband lost the land by judgment, so that she ought not to have any dower, and upon inquiry it was found to be a judgment by default, then that the tenant should further show what he had a right to according to the writ which he had first brought against the husband; and if he proved her husband had no right, nor any one but himself, then that the judgment should be, *quodd tenens recedat quietus*, and *quodd uxor nihil capiat de dote*; but if he could not show that, then that the woman should have judgment, *quodd recuperet dotem suam*: The same where a woman<sup>2</sup> being endowed, or a person tenant *per maritatum*, *per legem Angliæ*, for term of life, or in fee-tail, lost by default. Moreover, when these tenants claimed their

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(a) As already indicated elsewhere (*vide ante*, c. ix.), a recovery was only, even if real and adverse, effective as against the party — the recoverer and his heirs and legal representatives — that is, those “privy” to him in estate. It had no operation as regarded those who were strangers to him in estate, and claimed by title paramount to him. Hence the doubt as to the effect of a collusive recovery as regarded the widow of the recoverer, who, by virtue of her right of dower, might be held to claim rather adversely to than by virtue of the title of the recoverer. There was no doubt, however, that the heir of the recoverer would be bound by the recovery, and hence its efficiency to “bar an estate-tail,” that is, to bar the issue in tail, who were barred because they were bound by the recovery as being the heirs of the recoverer. The notion that this use of recovery first arose at the time of Taltarum’s case is entirely erroneous, and is a remarkable instance of a very common fallacy, that a rule of law, or legal proceeding, first arose at the time when it was first legally disputed and judicially decided. As regards dower, there was a case in the reign of Edward III., that a custom that if a man alien his land and expend the moneys between himself and his wife, she should be barred of dower, was a good custom (*Year-Book*, 3 *Edw. III.*). The principle on which this custom rested, the principle of equitable compensation, is the foundation of the system of settlement and jointure which, in modern times, has so largely superseded dower.

<sup>1</sup> This losing of land by default was nothing more than another instance where a feigned recovery was made use of to avoid certain restrictions imposed by the law of estates. A recovery having all the forms of a judicial proceeding, without any visible collusion, as in the former case, we find that the judges were startled with its apparent legality, and some held it to convey a clear, unencumbered title. We shall see that, in the course of two centuries, the judges in Taltarum’s case came to an agreement in favor of a feigned recovery, and adjudged it to convey a title, clear of all possible claims. [But this, it will be seen, was not the effect of that case.—Ed.]

<sup>2</sup> This was not a novelty; for it was the practice in the times both of Glanville and Bracton, that the widow in dower *unde nihil* should not be answered, unless she produced her warrantor, that is, her reversioner. *Vide ante*, c. vi.

lands so lost by default, and came to such a stage in the pleading as to be obliged to show their right, which they could not do without the aid of their reversioner, they were by this statute permitted to vouch such reversioners to warranty, the same as if they were tenants in the suit; and when the warrantor appeared, the suit was to go on between him and the person in seisin according to the tenor and form of the writ which had been first brought, and upon which the recovery had been by default, and so from several actions, says the statute, they would come to one judgment, namely, either that the demandant recover his demand, or the tenant go quit.

Again, when a woman having no title to dower, brought a writ of dower, during the infancy of the heir, against the guardian, and he, out of favor to her, made a redemption of the dower, or made default, or defended the suit so collusively that the dower was adjudged to her in prejudice of the heir, it was now provided that the heir, when he came of age, might demand the seisin of his ancestor against her, as against any other *deforceor*; so, however, as she should still have her exception to show her right to dower, and, if she made it out, should go quit and retain her dower, and the heir be amerced at the discretion of the justices; but if not, that the heir should recover his demand.

In like manner, if the heir or any other impleaded a woman for her dower, and she lost it by default, the default was not to preclude her from recovering it back again if she had right, which she might do by the following writ: *Præcipe A. quodd justè, etc., reddat tali quæ fuit uxor tali tantam terram cum pertinentiis in N. quam clamat esse rationabilem dotam suam,*<sup>1</sup> *et quam talis EI DEFORCEAT, etc.,* which writ has since been commonly called a *quodd ei deforcat*.<sup>2</sup> To this writ the tenant might plead that she had no right to be endowed, and if he could make it out he was to go quit; if not, she was to recover the land whereof she had been before endowed. Again, a man, losing his land by default, had no remedy except a writ of right; but this writ could only be maintained by such as claimed the mere right, which tenants for term of life, *per liberum maritagium*, or in fee-tail, could not, as

<sup>1</sup> Or, *de rationabili dote sua*.

<sup>2</sup> *Vide ante, c. vi.*

there was a reversion in some one else; it was therefore provided, that such defaults should not be wholly prejudicial to the defaulters, and several new writs of *deformceat* were given by this statute instead of the writ of right. The *quodd ei deformceat* for a tenant in *maritagio* was thus: *Præcipe A. quodd justè, etc., reddat B. tale manerium de C. cum pertinentiis quod clamat esse jus et maritagium suum, et QUOD prædictus A. EI DEFORMCEAT*; that for a tenant for life, *quod clamat tenere ad terminum vitæ*; et *QUOD prædictus A. EI DEFORMCEAT*; that for a tenant in fee-tail, *quod clamat tenere sibi et hæredibus suis de corpore suo legitimè procreatis, et QUOD prædictus A. EI DEFORMCEAT*. Such were the provisions of this statute ordaining the writ of *quodd ei deformceat* for persons possessed of a particular estate.

The writs framed by the last statute were designed as substitutes for the writ of right, either where a recurrence to that hazardous remedy would be inconvenient, or where the persons injured had no title by law to that writ. The statute which follows<sup>1</sup> made some regulations upon the same principle in case of usurpation of churches. This act is very full, and needs no other explanation than what the mere statement of it will give. It begins by saying, that there being three original writs of advowson of churches; one of them *de recto*, the other two *de possessione*, namely, that of *ultimæ præsentationis*, and that of *quare impedit*;<sup>2</sup> it had been the law and custom of the realm, that when a person having right presented to a church a clerk who was admitted, the true patron could recover his advowson by none but a writ of right, which was to be tried by the great assize, or by the duel (a); whence it followed, that

Of presentations  
to churches.

(a) Thus, where a lessee of an advowson presented a vicar to a parsonage which was full, and the presentee continued in possession for seven years, it was said (the case not being within the present statute), that the parson was put to his writ of right by reason of the lay possession (*Year-Book*, 44 *Edw. III.*, 33). The possessory remedy of *quare impedit* was when the patron was disturbed and resisted on his presentation, upon the vacation of the living (29 *Edw. III.*, 26), or upon the avowal of his right to present. Brooke's comment upon the statute makes it very clear: "It appears by the statute Westm. 2, c. v., that each presentment which was admitted put the true patron out of possession, and put him to his writ of right of advowson, and that at once and within the six months, for the six months were given by the statute; and at the common law, if tenant for life, etc., suffered a presentment, that put the reversioner or the heir to his writ of right of advowson, and so if the

<sup>1</sup> Ch. 5.

<sup>2</sup> Of the writ *quare impedit*, etc., vide ante, c. vi.

heirs within age, through the fraud or negligence of their guardians, and heirs, whether of age or not, through the fraud or negligence of tenants *per legem Angliæ*, tenants in dower, for life, for years, or in fee-tail, were many times disinherited of their advowsons, or at least put to their writ of right, and perhaps in the event wholly disinherited.

This was the grievance for which it was now intended to provide, by preventing such presentations from being prejudicial to the right heirs, or those in reversion after the death of particular tenants. For this purpose it was enacted, that as often as any person, having no right, should present during the wardship of the heir, or during the time of tenants in dower, *per legem Angliæ*, or otherwise for term of life or years, or in fee-tail; at the next avoidance, when the heir was of full age, or when he came into the reversion,<sup>1</sup> after the death of the before-mentioned particular tenants, he should have such possessory writ of advowson as his last ancestor would have had when the last avoidance happened in his time, or before the demise was made for a term, or in fee-tail, as before-mentioned (a). The same of presentation to churches of the advowson of married women, during the time they were *sub potestate viri*; the same of religious men, as archbishops, bishops, rectors of churches, and other ecclesiastical persons, who were all aided by this statute, in case of presentations made by persons having no right, during the time such

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parson, etc., should suffer usurpation; and this was remedied by the statute by which the reversioner or heir should have *quare impedit* at the next avoidance" (*Brooke's Abr. Presentation al Eglise*, fol. 46).

(a) It was held that this clause did not bind the king, on the general principle that a statute should not bind the king, if it was not by express words; and that, therefore, if the king usurped upon an infant to a benefice, this should put the infant out of possession; *non obstante*, the statute of Westminster 2, c. v., which aided usurpation upon an infant, *feme covert*, or those in reversion; for the king is not bound by it. For where a man presents to a benefice of the king, and his clerk was for six months, yet, the king shall have *quare impedit* after the six months; for, *nullum tempus occurrit regis*, for a statute does not bind him; otherwise of the case of a common person (*Year-Book*, 35 Hen. VI., 2).

<sup>1</sup> The words of the statute are, *postquam advocatio post mortem in formâ prædicta tenentium* (one of whom is a tenant in tail) *ad hæredem*—REVERSIONER, etc., which corresponds exactly with the passage before quoted from Britton; and is another instance to show that the legislature considered the statute *de donis* as giving only an estate for life to the tenant in tail, and a reversion to the issue. *Vide ante*, c. ix.

houses, prelacies, parsonages, or dignities were vacant.<sup>1</sup> However, this act was not to be construed as entitling an heir or reversioner to recover, upon suggestion that any of the before-mentioned particular tenants lost by feigned defences, as all judgments were to remain in force till reversed for error, or annulled by attainr or certificate.

Many other particulars upon the same subject were ordained by this act.<sup>2</sup> We have seen the tenant, in a *quare impedit*, might plead that before the writ was brought, the church was full of a parson presented by him, and this was a good plea to bar the action; but it was now ordained that one form of pleading should be observed in writs *ultimæ præsentationis*, and of *quare impedit*, and that the action should not fail by reason of such plenarty, so as the writ was purchased *infra tempus semestris*, within six months, though the party could not recover his presentation within the six months. Sometimes an agreement was made between several persons claiming one advowson, and enrolled before the justices in a roll or fine, to this effect, that one should present on the first avoidance, another on the second, another on the third, and so on. It was now ordained that should any be disturbed in such his presentation, he need not bring a *quare impedit*, but should resort to the roll or fine; and the sheriff should be commanded, *quòd scire facias* the party disturbing, to appear at a short day, as fifteen days, or three weeks, according to the distance of the place, to show what he could allege, wherefore the party complaining should not present; and if he did not come, or could not allege anything done since the fine to bar him, the complainant was to recover the presentation.

It was provided, that if, after the death of the person last presenting, the advowson was assigned in dower, or came to a tenant *per legem Angliæ* who presented, and the heir, after their deaths, was disturbed, he might at his election have either a writ *ultimæ præsentationis*, or of *quare impedit*. The like of advowsons demised for term of life or of years, or in fee-tail.<sup>3</sup> In writs of *quare impedit* and *ultimæ præsentationis*, damages were henceforth to be awarded, if the six months elapsed through the disturbance of any one, and the bishop presented; the statute

<sup>1</sup> Sect. 1.<sup>2</sup> Vide vol. i., 405; ante, c. viii.<sup>3</sup> Sect. 2.

ordains these damages to be two years' value of the church. If the six months are not past, and the presentation is deraigned within that time, the damages are only to be half a year's value; if, in the former case of presentation by lapse, the disturber has nothing to pay, he is to be imprisoned for two years; and in the latter, where the advowson was deraigned within the six months, he is to be punished by imprisonment for half a year.<sup>1</sup> These writs were thenceforward granted for chapels, prebends, vicarages, hospitals, abbeys, priories, and other houses of the advowson of others, of all which they did not lie at common law.<sup>2</sup>

It was ordained by the same statute, that when a person was prohibited from demanding tithes in another parish by the writ of *indicavit*,<sup>3</sup> the patron of the parson so prohibited should have a writ to demand the advowson of the tithes in question; and that when this plea was deraigned or decided for the demandant, then the plea in the ecclesiastical court might proceed.<sup>4</sup> Upon this clause a writ of right *de advocacione decimarum* was formed.<sup>5</sup> It was declared, that when one parcener presented to an advowson, and usurped upon another, he on whom the usurpation was made should not be wholly barred by his negligence, but should be permitted to present, when his turn came again.<sup>6</sup>

Some statutes were passed concerning admeasurement of dower and pasture,<sup>7</sup> and the condition of tenants in demesne with respect to their mesne and the chief lords. As the law now stood, if an heir within age assigned dower before the guardian in chivalry entered, the guardian could not compel an admeasurement thereof. It was therefore now enacted that a writ of admeasurement of dower should be granted to a guardian; and if he should prosecute the writ collusively, the heir was not to be barred thereby from admeasuring it. A speedier process was directed both in this writ and that for admeasurement of pasture. When it was come to the great distress, a day was to be given, within which<sup>8</sup>

Admeasurement  
of dower and  
pasture.

<sup>1</sup> Sect. 3.

<sup>2</sup> *Vide ante*, c. vi.

<sup>3</sup> *Ibid.*, vol. i., 409; *ante*, c. vii.

<sup>4</sup> Sect. 4.

<sup>5</sup> 2 Inst., 364.

<sup>6</sup> Sect. 5.

<sup>7</sup> *Vide* vol. i.; *ante*, c. vi.

<sup>8</sup> To effect this, the scheme of continuances fixed by the statute of *dies communes in banco* must sometimes be disturbed and dispensed with. *Vide ante*, c. viii.

two counties might be holden, and open proclamation was to be made for the defendant to come in at the day named in the writ; at which day, if he came not, and the proclamation was testified by the sheriff, admeasurement was to be made by default.<sup>1</sup>

Pasture was admeasured sometimes *coram justitiariis*,<sup>2</sup> sometimes in the county before the sheriff. It might happen that the pasture, after such admeasurement, was surcharged again by the same person with more beasts; it was therefore now ordained that upon the second surcharge the complainant should have the following remedy: If the admeasurement had been *coram justitiariis*, he should have a judicial writ to the sheriff, commanding him, in the presence of the parties summoned, if they chose to appear, to inquire *de secundâ superoneratione*. If the second surcharge was found, it was to be returned before the justices, under the seal of the sheriff and the seals of the jurors; upon which the justices were to award damages, and estreat the value of the beasts put into the pasture after such admeasurement, more than ought to have been: and such estreaths were to be delivered to the barons of the exchequer, like others, to be answered for to the king. If the admeasurement had been made in the county, then the plaintiff might have a writ out of chancery for the sheriff to inquire of the surcharge; and the sheriff was to answer to the exchequer for all the beasts put into the pasture above the proper number. That the sheriff might not defraud the king in such cases, a very particular course was directed; that all writs *de secundâ superoneratione* that issued out of chancery should be enrolled, and that at the year's end transcripts of them be sent into the exchequer, under the seal of the chancellor, that the treasurer and barons might see how the sheriffs answered for the produce of them. It was directed that writs of redisseisin likewise should be enrolled in the same manner, and sent into the exchequer at the end of the year.<sup>3</sup>

The grievances suffered by tenants in demesne, in consequence of any failure in the mesne lord, were very great. The law allowed a chief lord to distrain anywhere within his fee for his services and customs; the distress might therefore fall upon a tenant who had a mesne lord, that

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<sup>1</sup> Ch. 7.<sup>2</sup> *Vide ante*, c. vi.<sup>3</sup> Ch. 8.



was bound to acquit him towards the chief lord; such tenant, however, after he had replevied the distress, could not deny the title of the chief lord to his services and customs; and when he proceeded by writ of mesne against the mesne lord, *he* would perhaps stand out the long process of that writ. All this might happen when the mesne was able enough to make good the demand; but it became much worse when he was not. Again, though the law allowed such tenants in demesne to acquit themselves by paying to the chief lord the demands he had upon the mesne, yet the chief would sometimes refuse it, and persist in receiving them at the hands of his next tenant only; so that tenants in demesne might be ruined through the obstinacy of their chief, and the insufficiency of their mesne lord, though they themselves were able to pay all demands properly due from themselves. All these grievances required some redress, which was provided in the following way.

It was directed, that the tenant in demesne, as soon as he was distrained, should purchase his writ of mesne against the lord that was mesne between him and the chief lord; and if he absented himself till the great distress awarded, and had land in the same county, that the plaintiff should have a day given in the writ of great distress, before the coming of which two counties<sup>1</sup> might be held; and the sheriff should be commanded to distrain the mesne by the great distress, and likewise to cause him to be proclaimed in two full counties, to appear at the day contained in the writ, and answer to the complaint. If he did not appear he was to lose the services of his tenant, who was no longer to answer to *him* for any of them, but was, for the future, to do such services and customs to the chief lord, as he before did to the mesne; and if the chief exacted more, the tenant was to have all those exceptions which the mesne might have. If the mesne had no property, the tenant was, nevertheless, to prosecute his writ of mesne; and if the sheriff returned that he had nothing whereby he might be *summoned*, then an *attachment* was to go; and if the sheriff returned that he had nothing whereby he could be attached, still the writ of *great distress* was to issue, and the proclamation to be made in the above form, in order to give the

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<sup>1</sup> *Vide ante*, c. ix.

tenant the effect of the mesne being forejudged of his fee and services, as before directed. Again, if the mesne had no land in the county where the distress was taken, an original writ of summons was to issue in that county; and upon the sheriff returning that he had nothing in that county, a judicial writ of summons was to issue against him in the county where it was *testified* his land was; and suit was to be made in that county till it came to the great distress, and proclamation, as before-mentioned. Where it happened that the tenant in demesne was infeoffed to hold by less services than the mesne was bound to do to the chief lord, and he was attorned to the chief lord, after the forejudger of the mesne, in the above way, and the mesne excluded, he was nevertheless to answer to the chief lord for all such service as the mesne was bound to.

This was to be the course when the mesne did not appear; but if he did, and confessed he ought to acquit his tenant; or if he was compelled by judgment to acquit him, and after such confession, or judgment, complaint was made that he did not acquit him; then a writ judicial was to issue for the sheriff to distrain him to acquit his tenant, and to be at a certain day before the justices, to show why he had not acquitted him. When they had proceeded to the great distress, the plaintiff was to be heard; and if he could prove that he had not, the mesne was to satisfy him in damages, and the tenant to go quit, and be attorned to the chief lord. If he came not at the first distress, another distress was to issue, and proclamation to be made; and upon the return of it, there was to be a judgment, as before-mentioned.

It was not intended by this statute to exclude tenants from any remedy they had against their mesne at common law. This statute was continued to cases where there was *one* mesne only between the chief lord and the tenant, where that mesne was of full age, and where the tenant might attorn to the chief lord, without prejudice to any one but the mesne only. This was to except tenants in dower, tenants *per legem Angliæ*, or for life, or in fee-tail, for whom no remedy was intended by this statute; though, at the latter end of it there is a promise that provision should be made for them.<sup>1</sup>

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<sup>1</sup> Ch. 9.

To go on with the same subject of real remedies; we shall now mention what alteration the parliament made respecting pleading in the writ *de consanguinitate*, and how the writs of *cessavit*, of nuisance, *juris utrūm* (a), assize, and *redisseisin*, were extended to new cases, to which they did not before apply.

It had been a common answer to a writ of *mortauncestor*, that the demandant was not next heir of the ancestor by whose death he demanded the land; it was now ordained that in writs *de consanguinitate*, *avo*, and *proavo* (being of the same nature with a writ of *mortauncestor*), the same answer should be admitted.<sup>1</sup> We have seen, that by the statute of Gloucester,<sup>2</sup> a writ of *cessavit* was given against tenants in fee-farm who suffered the land to lie fresh; it was now ordained generally, that if any withheld from his lord his due and accustomed services for two years, the lord should have an action to recover his land in demesne by the following writ: *Præcipe A. quòd justè, etc., reddat B. tale tenementum quod A. de eo tenuit per tale servitium, et quod ad prædictum B. reverti debet, eò quòd prædictus A. infaciendo prædictum servitium PER BIENNIIUM CESSAVIT, ut dicitur*: and that, not only in this case, but also in cases within the statute of Gloucester, writs of entry should be had for the heir of the demandant against the heir of the tenant, and against those to whom such land should be aliened.<sup>3</sup>

The 24th chapter of this statute deserves particular notice, as having a very extensive influence on the course of legal remedies in succeeding times (b). In the first place, it declares,<sup>4</sup> that in cases

*Writs in consimili casu.*

(a) The statute of Westminster 2, c. xxiv., made this provision; and by 14 *Edw. III.*, c. xvii., it was provided that any chaplain or chantry priest, etc., could have the writ as well as a parson. In a case in the reign of Edward III., the writ was brought by the vicar of a church to try whether the land belonged to his vicarage or was lay-fee of an abbey to which his church was appropriate, and it was said that the vicar could have the writ to try "*utrum sit libera elemosyna pertinens ad vicariam ad libera elemosyna pertinens ad rectoriam*" (40 *Edw. III.*, fol. 29). It was there also said that in ancient times it had been considered that the vicar could not have an action against the rector, but that this was changed; and as the vicarage was endowed to him and his successors perpetually, and had his possessions for himself, if he was ousted by his parson or by any one else, he could have assize (40 *Edw. III.*, fol. 28).

(b) By reason of the principle it declared and laid down; but that prin-

<sup>1</sup> Ch. 20. *Vide ante*, 155.

<sup>2</sup> *Viz.*, ch. 4. *Vide ante*, 433.

<sup>3</sup> Ch. 21.

<sup>4</sup> Ch. 24.

where complainants were entitled to a writ in the chancery, grounded upon the fact of another,<sup>1</sup> the complain-

ciple was already in the common law, and it was not *only* declared but enforced by this statute, which was therefore, being declaratory, only necessary for the purpose of enforcing and compelling the practical observance of the principle. The principle was that upon which the whole administration of justice depended, and upon which alone any remedial writs were issued, viz., that it was the prerogative or duty of the crown to see that for every legal right, or rather for every injury to a legal right, there was a remedy. It was upon this principle, as it was laid down in the *Mirror*, "that every one have a remedial writ from the chancery according to his plaint" (*Mirror*, c. i., s. 3). All the original writs, as they were called, the writs originating actions in the king's courts, were issued; and it was manifest that, on the same principle, any others which were required by law could equally be issued. And that, while the writs already issued would afford established precedents for the same writs in the same cases, they would not preclude different writs in different cases, but on the contrary would embody principles on which other writs could be issued in all cases of injuries to legal rights. The statute therefore could not be legally necessary, and was only (as appears from a note of the author) required, by reason of the ignorance or narrow-mindedness of the clerks in the chancery; and this statute perhaps is the earliest of the numerous acts of legislation which have been required in consequence of this ignorant and narrow-minded adherence to the mere letter of forms, without a due regard to the *principles* they embody, and the objects for which they were established. The principle embodied in this statute was the foundation of that large class of actions commonly called actions "on the case," i. e., on the particular nature and circumstances of the case, as distinguished from the more fixed, formal, and general writs adapted to the more simple cases of earlier occurrence—as, for instance, actions of trespass *quare clausum fregit*. The action was a general action, fitted to the common case of entering the land in possession of the plaintiff, but the action by the reversioner for injury to the freehold was an action "on the case." It may be worth while to consider upon what principle a writ was required at all to commence an action in the king's court. For it is to be observed that the original writs were not in the nature of process, for they went not to the *party* sued, but the *sheriff*. This shows that they were rather in the nature of a commission or authority to the court to proceed in the suit. When it is borne in mind that (as already has been amply shown elsewhere) at common law, the original jurisdiction in all suits between party and party was in the *county court*, presided over by the *sheriff*, the necessity for some particular commission or authority to bring the suit in the king's court will perhaps be more apparent, and this also will explain why the writs went to the sheriff. This may be still further illustrated by the distinction between the writ of *justicies*, which directed the sheriff to hear and determine the case, and the original writ returnable in the king's court, which directed him to summon the party to attend there. Thus, therefore, the writ was the warrant to the sheriff to determine the *jurisdiction* of the suit; and if it was to lie in the king's court it was returnable there, and was in the nature of a *particular* commission. Hence it was distinguished from a *bill* of petition to the king in the king's bench or chancery, and therefore it was held that in the common pleas a suit should be commenced by *writ* and not by *bill*, i. e., by writ from the chancery to the sheriff, not by bill from the party to the court (*Year-Book*, 41 *Assize*, fol. 11). And again a writ,

<sup>1</sup> *De facto alicujus.*

ants should not depart from the king's court without remedy, because the land was transferred from one to

which was the warrant to found a particular private suit between party and party, was distinguished from a general commission of *inquiry* (42 *Assize*, fol. 12). For a writ directed the sheriff to summon a particular party at the suit or complaint of a particular party; and therefore must set forth some legal ground upon which the party to be sued *ought* in law to be so summoned and compelled to answer. For, upon the original writ, process issued in the first instance summons, and then of *capias* or *distringas* to compel appearance. And for all this the writ, as a kind of warrant in law, must show some legal ground, that is, some good cause of action. But it is manifest that any injury to a legal right would be a good ground of action, whether or not the precise case had ever occurred before. For every case must *once* have occurred for the first time, and the general principle on which any had been issued would warrant any other equally maintainable in law as a ground of action. At the same time, as the nature of the process and procedure varied in different kinds of action, it was thought necessary to distinguish them in the writ, and then when the party sued appeared and orally pleaded, he could object to the writ as not warranted by the real facts, as, for instance, upon a writ of trespass for taking goods, that the goods had been received on a bailment, and that therefore the action should be in *detinue* (*Year-Book*, 2 *Edw. IV.*, fol. 25). So an action against an innkeeper ought to be brought against him as such, and not in trespass (*Year-Book*, *Hen. IV.*, fol. 45), and the court would set aside the writ. So, on the other hand, if the law had provided a writ as a remedy in a particular case, the party could not frame another for himself, giving a different remedy as on a different ground (*Year-Book*, 11 *Hen. IV.*, 64). So in a *quod permittat* for diverting a stream, if it was shown that the stream was turned before the plaintiff had the land, so that the *diversion* was no nuisance to him, the writ could be abated, *i. e.*, set aside (2 *Hen. IV.*, 13), the remedy being an action on the case for continuance of the nuisance if either the defendant did not originally cause it, or if it was not caused in the time of the plaintiff. And that the writs might answer this purpose of practical utility it was required that they should set forth *in brief* (whence the word "brief") the ground and cause of action. It is to be observed that many of the actions "on the case" were deduced from the old real actions, which only lay between *freeholders*, whereas the actions, on the case lay by any one possessed of any legal right against any one injuring that right, whether or not a freehold right, or a right pertaining to a *freehold*. The general principle was laid down some centuries after this statute, that when there was any injury to legal right, "*action on the case lay, if no other remedy was provided*" (*Year-Book*, 14 *Hen. VIII.*, 31). That was an action for obstructing a stream, and it was objected that the remedy was an *assize*, but the court said that the action on the case lay, as it would lie in the case of a partial obstruction of a way (*Ibid.*). So where a man ought to have kept a sea-wall in repair, and had not done so, whereby the plaintiff's land was flooded, it was held that action on the case lay (*Year-Book*, 7 *Hen. IV.*, 8); though in such an action the party could do no more than recover damages, and could not, as in an *assize*, have the nuisance abated (*Ibid.*). In general, it may be said, that for nonfeasance or *neglect* of any legal duty the remedy would be action "on the case," trespass being the remedy for any direct act of tort or injury indicated by the words, *vi et armis* (43 *Edw. III.*, 17). So again the ancient action of waste lying against tenant of the freehold, action on the case lay against tenant at will (48 *Edw. III.*, 25). And there were innumerable cases in which there was no remedy but action on the case (*Year-Book*, 27 *Hen. VIII.*, 24). The statute may be illustrated by

another; as because there was no writ in the register in the chancery to be found adapted exactly to that special case, but the form of the writ was only to be had against the very person who actually raised the nuisance; so that should the house-wall, or the like, which occasioned the nuisance, be aliened to another, a writ was denied. That justice might no longer be delayed for want of legal remedies, it was now enacted, that when a writ was granted in one case, and a thing happened in *consimili casu*, and needing a similar remedy, a writ should be made accordingly. Then the statute gives this instance of a *similar* form: *Questus est nobis A. quod B. injustè, etc., levavit domum, murum, mercatum, et alia quæ sunt ad nocumentum, etc.* And if the nuisance levied was aliened from one to another, then it was to be thus: *Questus est nobis A. quod B. et C. levaverunt, etc.,* against both. In like manner, as a parson of a church might recover common of pasture by writ of novel disseisin, it was ordained, that from thenceforth his successor should have a *quod permittat* against the disseizor or his heir; though a like writ, says the statute,<sup>1</sup> was never before granted out of chancery. Again, as a writ had long been had to try *utrum aliquod tenementum sit libera eleemosyna alicujus ecclesiæ vel laicum fædum talis*,<sup>2</sup> in future there was to be a writ to try *utrum sit libera eleemosyna talis ecclesiæ, vel alterius ecclesiæ*, in instances where it was a contest between two churches to which the freehold belonged.

After the statute had given permission to extend several writs in the above way, there follows this general clause:

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one or two cases upon it, which occurred early in the next reign. In one case a writ of entry was brought on this statute in *consimili casu* on an alienation by tenant for life, he being dead, and it was objected that in such a case the statute was not necessary, for that the statute gave the remedy where the tenant for life was still living; because, by the common law, the reversioner was put to wait until the death of the tenant for life. And it was said, per Herle, J., in different cases there are different remedies, and the recovery which is ordained by the statute is during the life of the tenant who has aliened, for, after the death of the tenant, there is a recovery by the common law (*Year-Book*, 6 *Edw. II.*, fol. 200). In another case, a writ of entry was wrongly brought on the statute of Gloucester, when it was really founded on the statute Westminster 2, in *casu consimili* (*Year-Book*, 3 *Edw. II.*, fol. 75).

<sup>1</sup> So says the statute; but this writ was a known and established remedy in such case in the time of Bracton. *Vide ante*, c. vi. [This shows, as stated above, that the statute was only declaratory of the common law, and that the necessity for it, as for so many other declaratory acts, arose from the real or affected ignorance of the officials.]

<sup>2</sup> *Vide ante*.

“And as often as it shall happen in the chancery, *quodd in uno casu reperitur breve, et in consimili casu, cadente sub eodem jure, et simili indigente remedio, non reperitur*; then the clerici, or clerks of the chancery, shall agree in making a writ, or adjourn the complainant to the next parliament, and write the case in which they could not agree, and refer it to the parliament, when a writ should be made with the advice of persons learned in the law; lest it might happen that the king’s court should for a long time fail in administering justice to complainants” (a). The clerks here spoken of are no doubt the same as the persons said by Bracton to be employed in making out *brevia magistralia*. These writs are said by that author to be varied according as cases differed; and, it should seem, they were put in contradistinction to the *brevia formata*, that were not subject to such variation, without permission of the legislature.<sup>1</sup> Thus it appears, a sort of liberty had always been exercised by the clerks in chancery of adapting the forms of writs to particular cases. It is probable that this discretion might have been exercised under the direction or control of the council, which was resorted to on very particular occasions, where there was a doubt or difficulty which the clerks could not settle among themselves. It was to preclude the necessity of recurring to a higher authority, and to relieve that authority from the burden of such applications, that this statute confirmed and enlarged the power of the clerks in chancery, though it still leaves the choice of an application to parliament. The use that was afterwards made of this statute, in devising writs *in consimili casu*, will be seen hereafter. Of the many new writs that sprung from this parliamentary permission, one was emphatically called a writ of entry *in consimili casu*. The statute of Gloucester had given a writ of entry to the reversioner, where a tenant in dower aliened in fee, which writ has been usually called *in casu proviso*.<sup>2</sup> the alienation of a tenant by the courtesy was thought to be

(a) In the Year-Book 7 Edw. II., there is a case in which it was held that the writ of *juris utrum* could be had by an abbot or other ecclesiastical person, to try whether land was or was not held in *frankalmoigne*, or in fine and perpetual alms (7 Edw. II., fol. 274). It was, indeed, the only remedy by which an ecclesiastical person could discharge the land he held in right of his church, from services wrongfully claimed by a layman asserting the land to be held of himself.

<sup>1</sup> *Vide ante*, c. vi.

<sup>2</sup> *Ibid.*, c. ix.

*in consimili casu* with the former; and upon that idea such a writ was framed for the reversioner. This may serve, for the present, as an example of what were considered at that time as *similar cases* within the meaning of this act.

It should seem, from the next chapter of this statute, that the following were not considered by the legislature as cases of this sort. The writ of novel disseisin being the speediest remedy in the chancery, it was thought proper to extend it further than it had yet gone. It was therefore ordained<sup>1</sup> that it should lie of estovers of woods; profits to be taken in woods by gathering nuts, acorns, and the like fruits; for a corody; for delivery of corn and other victuals and necessities to be received yearly in a place certain; for toll, tronage, passage, pontage, and the like, to be taken in places certain; for the custody of parks, woods, forests, chases, warrens, gates, and other bailiwicks and offices in fee; and in all the before-mentioned cases the writ was to be expressed *de libero tenemento*, as was the form before. As heretofore<sup>2</sup> it lay in common of pasture, it was now to be granted in common of turbary, piscary, and the like commons (*a*), whether appendant to freeholds, or without a freehold by special deed, at least for term of life. Further, when a tenant for years, or in ward, aliened in fee, and by such alienation the freehold passed to the feoffee, it was ordained that there should be a remedy by writ of novel disseisin, and that as well the feoffor as the feoffee should be taken for disseizors; so that during the life of either of them the writ should lie; and if either of the parties died, then there should be a writ of entry. Some of the cases here mentioned are said by the statute, and truly, to be such as could not be redressed by an assize at common law.

(a) In these early times the right of taking different kinds of profit in the same land was often in different persons. Thus there is a case in *temp. Edward I., Fitz., Prescription*, 55: "That a man shall have land, and may plough and sow it, and cut and carry away the corn; and then, after the corn is sown and carried away, another shall have it as his several, and the other shall not meddle in the land, but to plough it and sow it, and to take the corn; and his beasts cannot eat in the land when he comes to sow it, or to plough it, or to carry it, but he shall have no other profit except the corn only; and still the freehold was in him. And this was found by verdict; and it was found that his beasts fed in the land; wherefore the defendant took them damage feasant, and he brought replevin. And all this matter was pleaded, and found by verdict; wherefore it was awarded that the defendant should have return, and also that the plaintiff should be in mercy."

<sup>1</sup> Ch. 25.

<sup>2</sup> *Vide ante*, c. vi.



A piece of law that seemed to be thoroughly understood in the last reign was now entertained with some scruple.<sup>1</sup> Some had doubted whether, in case of pasturing under a claim of common in the several lands of another, the remedy by assize would lie: to remove this doubt, it was now declared that it should (a). Where any false exception was made to defer the taking of the assize; as, that another writ of a higher nature was depending for the same land; and to maintain such exception, rolls or records were vouched to warranty, in order to create delay, while the persons in possession received the rents and other profits; it was now ordained, that though at common law the only penalty in failing to prove such exception was, that the assize passed; yet that the tenant should in future be judged for a disseizor, without taking the assize; and also that he should restore double damages, and suffer a year's imprisonment. If such exception was alleged by a bailiff, neither the taking of the assize, nor judgment for restitution of the freehold and damages, were to be delayed. However, should the master of such bailiff afterwards come before the justices, and allege that a writ of a higher nature was depending, or the like exception, a writ of *venire facias recordum* was to be granted: and, if upon the return, it appeared to the justices that the record would have barred the writ if produced, it was ordained that the other party should be warned to appear to give restitution of his seisin and damages to the defendant, and that he who first recovered should be punished by imprisonment, at the discretion of the justices. Further, if there were any writings, or deeds of release, or the like, which were not (nor could by a bailiff be) shown to the jurors, the justices, on sight thereof, were to cause the party recovering, and also the jurors of the same assize, to be warned to appear; and if it was found by the assize that the writings were true, he who brought the assize, contrary to his own deed, was to be punished, as before mentioned. Further, it was ordained, in all assizes, that the sheriff should no longer take an ox of the disseizee,<sup>2</sup> but of the disseizor only; and if there were many disseizors named in one writ, yet that he should have only one ox. The ox was not

(a) Upon which, however, it was held that writ of entry in the nature of an assize would not lie (*Year-Book*, 4 *Edward IV.*, fol. 2).

<sup>1</sup> *Vide ante*, c. vi.

<sup>2</sup> *Ibid.*

to be more than five shillings' price (a): nor was he to take more than that price in lieu of it.

The remedy given to the defendant after the assize and judgment had passed, was, as we have seen, called<sup>1</sup> a *certificate* of assize; and now it was allowed by the former branch of this statute upon matters of record; by the latter, upon deeds and quit-claim; and this was to be not only in the assize of novel disseisin, but in those of *darrein presentment*, *juris utrum*, and *mortauncestor*.

Several additions were made to some provisions of the statute of Merton. The provisions of the statute of Merton, and likewise of the statute of Marlbridge, about redisseisins,<sup>2</sup> had three additions made thereto by chapter xxvi. of this act. First, double damages were in future to be given in writs of redisseisin; secondly, redisseizors were not to be replevisable by the common writ, that is, by the writ *de homine replegiando*; and thirdly, whereas in the statute of Merton that writ was provided for such as were disseized after they had recovered *by assize* of novel disseisin, of *mortauncestor*, or by *juries*; it was now to lie for those who recovered by default, reddition, or otherwise, without any recognition either by assize or jury.<sup>3</sup>

By chap. 35 of this act several alterations were made in the statute of Merton<sup>4</sup> concerning the taking away of wards, as will be easily seen by comparing the two statutes. The present statute enacts,<sup>5</sup> concerning children, male or female,

(a) The relative value of money at different periods of our history is of great importance, as it not only illustrates statutable enactments, but is necessary to understand them. And to appreciate the real comparative value of money at different periods, it is necessary to notice its relative power at the respective periods with reference to the price of commodities. We see here that an ox was at this period worth only 5s., whereas the price would now be probably £20, whence it appears that the real value of money at that time was not less than eighty times what it is now. The same conclusion may be drawn from an ancient ballad, "King Edward IV. and the Tanner," in which the tanner, who is represented as well off, boasts that his horse had cost him four shillings. A wealthy tradesman would hardly boast nowadays as to the value of a horse which cost him less than £30 or £40. There are cases in the Year-Books which lead to the same result. Thus there is a case in the reign of Edward IV. in which it was held that the taking of a cart laden with corn, and the two horses which were harnessed to it, was not an excessive distress for the sum of *two shillings* (*Year-Book*, 20 *Edward IV.*, fol. 3, pt. 16). These instances may suffice to show the value of a shilling in the age of Edward I. It was near the value of *four or five pounds* at the present time.

<sup>1</sup> *Vide ante*, c. vi.

<sup>3</sup> Ch. 26.

<sup>5</sup> Ch. 35.

<sup>2</sup> *Vide ante*, c. v. and c. viii.

<sup>4</sup> *Vide ante*, c. v.

whose marriage belonged to another, *raptis et abductis*, taken and carried away, that if the person, *qui rapuit*, had no right in the marriage, yet, though he restored the child unmarried, or paid for the marriage, he should nevertheless be punished for the offence by two years' imprisonment; and if he did not restore the child, or married it after the years of consent, and was not able to make satisfaction for the value of the marriage, he should abjure the realm, or suffer perpetual imprisonment. The following writ in such case was given for the plaintiff, called since a writ of *ravishment of ward*: *Si A. fecerit te securum de clamore suo prosequendo, tunc pone per vadium, etc., quòd sit coram, etc., ostensurus quare talem hæredem infra ætatem existentem, cujus maritagium ad ipsum pertinet, tali loco inventum RAPUIT ET ABDUXIT contra voluntatem ipsius A. et contra pacem nostram, etc.* If the heir was in the same county, then this clause was added: *Et diligenter inquiras ubi ille hæres sit in ballivâ tuâ, et ipsum, ubicunque fuerit inventus, capias et salvò et securè cus todias, ita quod eum habeas coram præfatis justic, etc., ad præf. terminum, ad reddendum cui prædictorum A. vel B. reddi debeat, etc.* Upon this there issued process of distress, if he had anything to be distrained by; and if he had nothing, and did not appear, he was to be exacted and outlawed.

If the heir was conveyed into another county, a writ to the same effect issued to the sheriff of that county. If the heir died before he was found, or before he was restored to the plaintiff, the suit was yet to go on, as the ravisher was still to be punished for the offence. Again, if the plaintiff died before the suit was determined, it was to be resummoned at the suit of the heir; and if the ward belonged to the plaintiff by gift or sale, then at the suit of his executors. If the defendant died, the action was in like manner to go on between the plaintiff and his heirs or executors by resummons, though the punishment of imprisonment was not to extend to them. In like manner, in the writ *de communi custodiâ*, which began, *Præcipe tali, etc., quòd reddat, etc.* (meaning the writ of right of ward); if either party died, it was to be resummoned, with distress, and proclamation at three county courts; and if the defendant came not, judgment was to pass, with a saving of his right, if he would afterwards claim it. The same, says the statute, shall be done in the writ *de transgressione*, wherein a person complained that he was

Ejection of  
ward.

ejected from wardships of this kind. This is the first mention of the writ *de ejectione custodiæ*, or *ejectment of ward*.

Notwithstanding what has been said on the case of ward and marriage of an infant heir, when he had two inheritances, one descended<sup>1</sup> *ex parte patris*, which was held of one lord, and another *ex parte matris*, which was held of another, a doubt is expressed in this statute to which of the lords the marriage of the heir should belong. To settle this, it was now declared<sup>2</sup> that the marriage should belong to that lord by whom the child's ancestor was first enfeoffed, not having respect to the sex, nor to the quantity of land, but only to the more ancient feoffment by knight's service, which merely established this point of law upon the foot on which it stood in the times of Glanville and Bracton.

Another provision of the statute of Merton<sup>3</sup> was extended by a subsequent chapter<sup>4</sup> of this statute. The regulation made concerning tenants encroaching on their lords was extended to neighbors, who had as little or less right than a lord's own tenants to encroach on his wastes. This was to hold good in all cases where pasture was claimed as appurtenant to their tenements; but where common was claimed by special grant, or feoffment, for a certain number of cattle; there, upon the principle that *conventio vincit legem*, the person entitled was to recover conformably with the terms of the grant. It was enacted (*a*), that no person should in future be liable to an assize of common of pasture, on account of any windmill, sheepcote, dairy, or the necessary enlarging of a court or

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(a) These statutes are still in force, and are of great importance with reference to the question of the enclosure of waste lands. It has lately been held that an owner of a common may approve under the statutes 20 Hen. III., c. iv.; and 13 Edw. I., stat. i., c. xlvi.; that the owner of a common may erect thereon a house necessary for the habitation of beast-keepers, for the care of the cattle of himself and the other persons having rights of common there; and that so he may erect a house necessary for the habitation of a wood-ward, to protect the woods and the underwoods on the common (*Patrick v. Stubbs*, 9 Mee. & W., 830). In that case, to an action for a continuing disturbance of common, the defendant pleaded an approvement of the *locus in quo*, "leaving sufficient of common pasture for the said plaintiff, and all other persons entitled thereto, together with sufficient ingress and egress to and from the same, according to the form of the statute," etc.—held that the plea sufficiently showed that enough of common was left at the time of the approvement, and in the place where the plaintiff was entitled to enjoy it (*Ibid.*).

<sup>1</sup> *Vide ante*, c. v.

<sup>2</sup> Ch. 16.

<sup>3</sup> *Vide ante*, c. v.

<sup>4</sup> Ch. 46.

curtelage. Where a person having right to approve had made a hedge or dike, which was thrown down in the night, or at any other time, but the offenders could not be found, nor would the people of the neighboring towns cause them to be indicted, the neighboring towns were to be distrained to repair the damage at their own costs (*a*). It was also enacted, that where common was usurped during the infancy of an heir, during the time a woman was *sub potestate viri*, while the pasture was in the hands of a tenant in dower, tenant *per legem Angliæ*, or for term of life or years, or in fee-tail, and the usurper had entered within the time of limitation in a writ of mortmain, the parties should not have recovery by an assize of novel disseisin, if they had no common before. This was declared by statute, because some had said that such pastures were to be considered as appertaining to the freehold, and so that a writ of novel disseisin was a proper remedy.

These are the parts of this statute which relate to private rights, excepting only chaps. xxxii., xxxiii., and xli., concerning property in mortmain, which have been mentioned in a former part of this reign.<sup>1</sup>

The regulations made by this statute for the administration of criminal justice were few. It was complained that many procured false appeals of homicide, and other felonies, to be brought by appellors who had no property, either to satisfy the king for the false appeal, or the party appealed in damages; it was therefore ordained, that when an appellee was acquitted, either at the suit of an appellor or of the king, the justices before whom the appeal was heard should punish the appellor by a year's imprisonment. The appellor, nevertheless, was to restore to the party appealed, according to the discretion of the justices, the damages he had sustained by the arrest, imprisonment,

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(*a*) An approvement could be pleaded in bar to a *quod permittat* for common, as in a case in the 5th Edward II., where the plaintiff craved that the defendant might be summoned on a writ *quod permittat ipsum habere common au pasture*; and the defendant said that he had made an approvement of so much of the land, saving to the plaintiff sufficient common, and he prayed a recognition to be taken whether he had the better right to the land thus enclosed by reason of the approvement; to which the other party could reply that he had not sufficient common (*Year-Book*, 5 *Edw. II.*, 160). Here we see the origin of the writ *ad quod dampnum*; and the more modern enclosure acts, based upon the principle of an equitable division of superfluous waste lands, leaving to all parties sufficiency of common.

<sup>1</sup> Ch. 32, 33, 41. *Vide ante*, c. ix.

and disgrace attending it, besides a fine to the king. If the appellor was not able to pay the damages, it was to be inquired (if the appellee desired it) by whose abetment or malice the appeal was commenced; and if it was found by the inquest that any one was the abettor therein, it was enacted that he should be distrained, at the suit of the party appealed, by a judicial writ, to come before the justices, and, if he was convicted, he should be punished as the appellor. It was further ordained, contrary to the ancient practice, that in an appeal *de morte hominis*, no essoin should lie for the appellor, in whatsoever court the appeal might be.<sup>1</sup>

Another grievance was that sheriffs would pretend persons were indicted before them, in the tourn, of felonies and other offences, and upon that would apprehend them and confine them in prison, and so exact money for their discharge, though they were neither indicted by twelve jurors nor guilty of any offence. To put a check upon this abuse of jurisdiction, it was enacted that sheriffs in their tourns, and other places where they had power to inquire of offenders by the king's precept, or *ex officio*, should cause the inquests of such malefactors to be taken by lawful men, and by twelve at the least, who should put their seals to the inquisitions; and persons found guilty by such inquisitions were to be taken and imprisoned as heretofore. If sheriffs imprisoned others than such as were indicted by inquests of this kind, persons so imprisoned might have their writ *de imprisonmento*, as against any other person who imprisoned them without authority; the like of other bailiffs of liberties.<sup>2</sup>

Presentments  
of jurors to be  
sealed.

The crime of rape was once more changed into that of felony. It is provided, says the statute,<sup>3</sup> that if a man ravish a woman, whether married, damsel, or other, where she did not consent, either before or after, he shall have judgment of life and member; this was to be at the suit of the party. Likewise, where a man ravishes a woman, whether *dame espouse*, a married lady, damsel, or

Rape.

<sup>1</sup> Ch. 12. It seems to have been doubtful in Bracton's time, whether an essoin should be allowed to the appellee, in appeals for smaller offences; and, therefore, it is most probable it did not lie in that *de morte hominis*. *Vide ante*, c. vii. But in Glanville's time it lay for both parties. *Vide ante*, c. iv.

<sup>2</sup> Ch. 13.

<sup>3</sup> Ch. 34.

other, with force, although she consent after, he shall have judgment as before-mentioned, if attainted at the suit of the king; and in this case, says the statute, the king shall have the suit. Thus the election given by the old law to the person ravished was wholly taken away.<sup>1</sup>

It is said<sup>2</sup> there was a writ at common law, *de uxore abductâ cum bonis viri*, for the husband, though there is no mention of any such in Bracton; however, this statute provides, *de mulieribus abductis cum bonis viri*, that the king should have his suit for goods so taken, so that such offenders might now be proceeded against criminally, as well as civilly. If a woman willingly left her husband, and went away and continued with her adulterer, she was, upon conviction thereof, forever to lose her action of dower, unless the husband would willingly, without any coercion of the church, be reconciled to her, and cohabit with her, in which case her right of action was restored. A person who took away a nun, though she consented, was by this act to be punished with three years' imprisonment, to be fined to the king, and make a reasonable satisfaction to the house.<sup>3</sup>

Several statutes were made for regulating the officers of courts, settling their fees, and preventing extortion and imposition upon suitors,<sup>4</sup> similar to some regulations made by the first statute of Westminster.<sup>5</sup> One of these aimed higher than the ministers of courts. The chancellor, says the statute,<sup>6</sup> treasurer, justices, any of the king's counsel, clerks of the chancery, of the exchequer, of any justice, or other officer; any of the king's house; clergy or lay, shall not receive any church, or advowson of a church, land, on tenement in fee, neither by gift or purchase, nor to farm, *ne a champert* (that is, to have a part, or *campi partitio*, since called *champerty*), nor otherwise, so long as the thing is in suit before them, or any other of the king's officers. If any did contrary hereto, both purchaser and seller were to be punished at the king's pleasure. The *dividing* part of the thing in question is a bribe mentioned in the first statute of Westminster;<sup>7</sup> but it is first spoken of here under the name of *champerty*.

<sup>1</sup> Vide vol. i., c. iv.; ante, c. ix. <sup>5</sup> Viz., ch. 26, 27, 28, 30. Vide ante, c. ix.

<sup>2</sup> F. N. B., 121 K.

<sup>6</sup> Ch. 49.

<sup>3</sup> Ch. 34.

<sup>7</sup> Viz., ch. 25. Vide ante, c. ix.

<sup>4</sup> Ch. 42, 44.

After the numerous provisions made by this statute for the amendment of the law, it concludes with a sort of anxiety lest anything should be left not provided for, *super verò statutis in defectum legis, et ad remedia editis ne diutius querentes, cum ad curiam venerint, recedant de remedio desperati, habeant brevia sua IN SUO CASU PROVISA*,<sup>1</sup> referring, as it should seem, to the 24th chapter,<sup>2</sup> which had given the authority to clerks in the chancery to frame writs *in consimili casu*.

The next act of this parliament is the statute of Winchester; containing some provisions for enforcing the ancient police, and ordaining some new regulations. The act states, that robberies, murders, burnings, and thefts, increased more than ever; and that this was to be attributed to want of a due administration of the subsisting law. It is said to have been very much owing to the negligence or wilfulness of jurors, who, being connected either with felons or receivers, could not be brought to indict them: again, jurors were not, as they should be, of the neighborhood where the offence was committed; nor was there any penalty upon jurors guilty of such concealments and neglects. To remedy this, says the statute, the king hath established a penalty for such concealment; so that, if they disregarded their oath, they might be in some fear of the penalty. But there being no specific penalty named, it should seem, it must be ascertained by the discretion of the court. It further directed that *cries*, that is, the *hutesium et clamor*, should be solemnly made in all counties, hundreds, markets, fairs, and other places where there was great resort of people, so that none might excuse himself for ignorance: by these means the country would be so well kept, that none could escape for want of fresh suit from town to town, and from country to country<sup>3</sup> (a).

(a) This was the earliest of the statutes of "hue and cry," and other statutes, which have been continued to our own time by more modern statutes, all based on the ancient institutions of the hundred and of frankpledge, making the hundred responsible for robberies, riots, etc. See a case on the act, *Year-Book*, Edw. II., fol. 539. The next statute on the subject was that of the 27 Eliz. (*vide post*, vol. v.); as to which, however, it was held that it merely altered the proceedings, and that the statute which gave the right of action was the above, the statute of Winchester (*Andrew v. The Hundred of Lewkner*, *Yelverton's Rep.*, 106). The modern statute on the subject was the 8 Geo. II., c. 16.

<sup>1</sup> Ch. 50.

<sup>2</sup> *Vide ante*.

<sup>3</sup> Ch. 1.



Moreover, when it was necessary, inquests were to be made in towns by the lord of the town, and afterwards in the hundred, in franchises and in the county, and sometimes in two, three, or four counties, in case of felonies committed in the marches of shires, so that the offenders might be attainted. If the country would not answer for the bodies of such offenders, the following penalty was ordained: the people dwelling in the country were to be answerable for the robberies done, and the damages sustained; so that the whole hundred where the robbery was committed, with the franchises therein, should be answerable for robberies; and if they were done in the division of two hundreds, *both* the hundreds and the franchises within them were to be answerable. The hundred was to have only forty days allowed them to agree for the damages, or answer for the bodies of the robbers.<sup>1</sup> This policy of compelling a certain district to make good secret mischiefs committed therein, had been pursued in the former statute of this year against those who broke down hedges, and committed other acts of mischief in the night.<sup>2</sup> Upon this provision of the statute of Winchester an action has been grounded, by which a person robbed may recover against the hundred the loss he has sustained. This has since been put under certain restrictions by several statutes.<sup>3</sup>

By way of prevention it was enacted, that in great walled towns, the gates should be closed from sun-setting to sun-rising; that no one should lodge in the suburbs, or in any place out of the town, from nine o'clock till day, unless his host would answer for him. Every week, or at least every fifteen days, the bailiffs of towns were to make inquiry of persons lodged in the suburbs and extremities of the town; and if they found any who had lodged strangers or suspicious persons against the peace (for so it was called), the bailiffs were to do right therein. Watches were to be kept, as has been used in former times, that is, from the day of the Ascension to the day of St. Michael; in every city, six men at each gate; in every borough, twelve men; in every town, six or four, according to the number of inhabitants; and these were to watch continually from sun-setting to sun-rising. If any stranger

<sup>1</sup> Ch. 2.    <sup>2</sup> Westm. 2, ch. xlvi. *Vide ante*, c. x.

<sup>3</sup> Stat. Eliz., etc.

passed by, the watch were to arrest him till morning; and if any suspicion appeared, he was to be delivered to the sheriff, who was to keep him safe till he was delivered in due manner. If any one resisted the arrest, hue and cry was to be raised; and those who kept watch in the town were to follow the hue and cry from town to town till the offender was taken. It was enacted that no one should be punished for arresting such strangers.<sup>1</sup>

It was directed, that highways should be cleared from woods, bushes, and dikes, to prevent any one from lurking there: this was to be for two hundred feet on each side of the road. However, ashes and large trees were not to be felled to make such clearance. If robberies were committed through the owners' refusing or neglecting to clear the roads in the above manner, they were to be answerable for the felonies; and if murder was done, they were to make fine at the king's suit. If the owner could not remove trees and bushes himself, the country were to aid him: the same of the king's demesnes and forests. Moreover, if a park was made by the side of a highway, it was to be at the distance of two hundred feet; or a wall, dike, or hedge, was to be made, that offenders might not come out to commit offences, and then escape back again.<sup>2</sup> It was further directed, that every man should have harness and arms, according to the old assize of arms, with some variations directed by this statute.<sup>3</sup>

The next act of this parliament is the *statute of merchants*; which, having been mentioned before, we proceed to the statute of *Circumspectè agatis*. This is so called, from the initial words of it; though it is rather in the form of a writ, from the king to his justices, concerning the bishop of Norwich and his clergy, beginning, *Rex talibus iudicibus salutem, Circumspectè agatis, etc.*, without any mention of the concurrence of the parliament.<sup>4</sup> However, it has always been considered as a statute; is referred to by a subsequent parliament as such; and, after what has been before observed on the form of our old statutes,<sup>5</sup> the reader may not, perhaps, consider such deficiency of parties or wording as very singular or material.

<sup>1</sup> Ch. 4.<sup>2</sup> Ch. 6.<sup>3</sup> *Vide* vol. i., c. iv.; *ante*, c. ix.<sup>4</sup> Ch. 5.<sup>5</sup> 2 Inst., 487.

We have no authentic account of the disputes between the temporal and spiritual courts during this reign<sup>1</sup> (a); but it may be collected from the present statute, that some points were thought not to be sufficiently adjusted. This act was designed to ascertain the boundaries of ecclesiastical jurisdiction in some particulars;<sup>2</sup> for which purpose it directs, that the bishop of Norwich and his clergy (a contest with whom might, probably, be the immediate occasion of this act) should not be punished, if they held plea of such things as were *merè spiritualia*: as, for instance, of penance enjoined by prelates *pro mortali peccato*, as fornication, adultery, and the like; in which cases sometimes a corporal, sometimes a pecuniary pain was inflicted, especially if the person offending therein was a freeman: also, if prelates punished any one for having a churchyard uninclosed, a church uncovered, or not decently ornamented; in which cases none but pecuniary penalties could be imposed. So if a rector demanded parochial oblations and tithes due and accustomed, or claimed against another rector tithes, whether large or small, so as they did not amount to the fourth<sup>3</sup> part of

(a) As already seen, Edward I. was exceedingly arbitrary, and the clergy, and especially the prelacy, felt the pressure of his power and the rapacity of the king. There is an entry of a claim of £20,000 against the Archbishop of York, for a supposed contempt of the crown, in excommunicating civil officers for imprisonment of ecclesiastical officers for execution of ecclesiastical process, although, as both the ecclesiastical process and the power of excommunication were undoubtedly, at that time, recognized by the law, it is hard to see in what the contempt consisted. The prelate, however, was about to be committed to prison for his supposed offence, when he purchased his liberty by paying the enormous sum of £4000 — probably equal to £80,000 at the present time (*Year-Book, Edw. III.*, 28). The temporal courts did not allow any interference of the ecclesiastical power with their administration of justice. Thus, for instance, an ecclesiastical inhibition would be no excuse to a bishop in a court of law for neglect or default in the performance of any duty devolved upon him by law in the administration of justice, as by certificate of some matter of ecclesiastical cognizance or the like. Thus, in a case where plenarty was alleged, and reference was made to the bishop in the usual way, to certify as to the fact, and he excused himself from so doing on the ground of an inhibition from the archbishop, it was held to be no excuse, "for the bishop cannot excuse himself against the command of his sovereign in his own land" (*Year-Book*, 17 *Edw. II.*, fol. 533).

<sup>1</sup> Some statutes and other instruments which are assigned to this reign by Lord Coke, are to be found among the *statuta incerti temporis*, and will be mentioned in the next reign.

<sup>2</sup> For such cases as were allowed to belong to the spiritual jurisdiction, *vide ante*, c. vii., etc., and c. viii.

<sup>3</sup> In Bracton's time it was limited to a sixth. *Vide ante*, c. vii.

the value of the church: again, if a rector demanded a mortuary in places where it was customary; so if a prelate of any church, or a patron, should demand from the rector a pension as due to him; it was ordained that all such demands should be made in the ecclesiastical court. As to the laying of violent hands upon a clerk, and causes of defamation, it was, says the statute, heretofore allowed, that suits of that sort should be heard in the court Christian, if money was not demanded, and they went merely *ad correctionem peccati*: the like of suits *de fidei læsione*. In all the above-mentioned cases, says the act, the ecclesiastical judge had jurisdiction, *regiâ prohibitionē non obstante*.

Such is the adjustment made by the statute of *Circumspectè agatis*. In the twenty-fourth year of this king there is a statute upon the same subject of ecclesiastical jurisdiction, which may be more properly mentioned here than in its chronological order: this is called *the statute of the writ of<sup>1</sup> consultation*. It seems the writ of prohibition had been resorted to very frequently, in cases where no remedy could be had in the king's court by writ out of chancery; so that persons who could obtain no remedy in the temporal courts were deprived also of such as might be procured in the spiritual. A representation on this subject was made to the king; and it was now ordained, that, in future, when the ecclesiastical judge was stopped by a prohibition, the chancellor, or the king's chief justice for the time being, upon sight of the libel in such case, at the instance of the complainant, if he saw there was no remedy in such case by a writ out of chancery, but that it belonged to the ecclesiastical court to determine it, should write to the judges before whom the cause depended, *quodd in causâ procedant, non obstante prohibitionē regia sibi prius inde directâ, etc.* Thus was it designed to give protection and energy to the ecclesiastical court when it exercised a jurisdiction supplemental, as it were, to the temporal courts, in correcting those excesses for which the poverty of the common law had not yet provided any redress.

A statute for regulating the police of the city of London, entitled *statuta civitatis Londini*; and another, entitled *forma concessionis et exemplificationis Chartarum*, confirming the charters, make the remainder of the statutes enacted in the famous parliament of Westminster, in the thirteenth year of this king.

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<sup>1</sup> Stat. 24 Edw. I., of the writ of consultation. Vide ante, c. vii.

## CHAPTER XI.

### EDWARD I.

STATUTE OF QUO WARRANTO—STATUTE OF QUIA EMPTORES—MODUS LEVANDI FINES—STATUTE DE FINIBUS LEVATIS—WRIT OF AD QUOD DAMNUM—STATUTE OF ARTICULI SUPER CHARTAS—COURT OF THE STEWARD AND MARSHAL—WRIT OF CONSPIRACY—OF THE DIFFERENT COURTS—AN ACTION OF DEBT IN THE STEWARD'S COURT—COMMON WRIT OF DEBT—OF DETINUE—OF COVENANT—OF TRESPASS—THE CRIMINAL LAW—THE KING AND GOVERNMENT—STATUTES AND RECORDS—FLETA—BRITTON—HENGHAM—THORNTON—JOHN DE ATHONA—MISCELLANEOUS FACTS.

PASSING over the *Statutum Exonia*, 14 Edw. I., concerning inquisitions taken before coroners (a), and some *articuli* upon that statute, as also the *ordinatio pro statu Hiberniæ*, 17 Edw. I., mentioned in the former part of this reign; we come to the eighteenth year of this king, when a parliament was holden, commonly called Westminster the third. This parliament produced four very important statutes. The first is the statute *quia emptores terrarum*; two statutes of *quo warranto*; and one entitled *modus levandi fines*.

To begin with the statute of *quo warranto*, 18 Edw. I., stat. 2. Before we speak of this statute, it will be necessary to take notice of one on the same subject, and bearing the same title, enacted in the sixth year of the king. This statute was for a long time considered as made in the thirtieth year of this reign; but that is now agreed to have been only a publication of it under the great seal; and indeed it is there recited as having passed in the sixth, to which place we now restore it.

We have before seen the nature of the proceeding by *quo warranto*, or *quo jure*.<sup>1</sup> This writ was brought forward

(a) It is to these Britton alludes in the chapter *De Ministris*, i. e., officers of the crown, in the article which states that "soit enquis de prises et de fraudes de coroners et de leur clerks et de leur ministres selonque ce que est contenu en nos statutes de Excestre" (*Britton*, fol. 64).

<sup>1</sup> *Vide ante*, c. vii.

into more notice by the frequent use which the present king caused to be made of it, and by these two statutes for regulating the process, and proceeding therein (a). The king, in execution of the plan of reducing the nobles under his sovereign authority, had begun to make strict inquiry into the titles by which franchises and liberties were claimed. Some of these he had resumed by judg-

(a) One of the great characteristics of this reign was the unscrupulous recourse to this writ on the part of the crown, and the strict, and indeed strained, enforcement of any prerogatives or rights of the crown which it occasioned. There was probably no species of claim which could possibly be set up by the crown which was not made at this period, and whenever a subject exercised a right which could be shown, or supposed to be a royal franchise, his title to it was challenged. Hence the records of this reign are full of proceedings relating to every possible species of royal franchise or prerogative. Thus, for instance, the crown claimed the sea-shore, and as incident thereto, the right to take wreck, and any one who took wreck was challenged to show his title. Thus the Earl of Cornwall had *wreckum maris per comitatum Cornubiæ*, and his title being questioned in *quo warranto*, had judgment (14 *Edw. I.*, *B. R.*, rot. 6, *Corn.*). "For the better understanding of this act, says Coke, it shall be necessary out of history to show the cause of the making thereof. The truth is, that the king wanting money, there were some who persuaded him that few or none of the nobility, or clergy, or commonalty that had franchises of the grants of the king's predecessors, had right to them, for that they *had no charters to show for them*, for that in truth most of the charters were by length of time or casualty lost or consumed, whereupon it was openly proclaimed that every man that held those liberties or other possessions by grant from any of the king's predecessors should, before certain persons thereunto appointed show *quo jure illi retinerent*, etc., whereupon many that had long remained in quiet possession were taken into the king's hands." And then this statute was passed to provide a remedy. "And for such as lay in point of charter granted before time of recovery, the party grieved had two remedies, either by allowance or confirmation: by allowance before the justices (of king's bench or of eyre), or confirmation by the king under the great seal, and these were sufficient without showing the charter. And if the franchises of either sort were granted within the time of memory, yet if the same had been allowed they might be claimed by force of the allowance without showing the charter." And so, says Coke, the remedy was perfect and plenary (2 *Inst.*, 28), though it was hardly so secure if allowance had not been obtained, and as prescription opposed a non-existing grant, it might have been allowed to prove a grant. "So all men should enjoy their franchises, which they had reasonably used, until the court came into the county. But, says Coke, you will inquire what remedy there was for him that could not produce his charter? To which he answers, That these franchises were of two kinds, the one such as may be claimed by usage and prescription, as wreck of the sea, waif and stray, fairs, markets, and the like, which are gained by usage, and may become due without matter of record; and felon's goods, etc., and the like, which grow not without matter of record, and therefore cannot be claimed by usage *in pais*, but by charter. And yet all these were at first derived from the crown. All these were granted either before or after the time of memory; if before the time of memory, then for the former kind the party might claim by prescription" (*Ibid.*).

ment of his courts of law; and many prelates, earls, barons, and others, had days fixed when they were to make out their titles, and the whole would be examined: but to quiet the minds of men till this matter was investigated, it was, among other things, enacted in the sixth year of the king, that a writ should issue, commanding the sheriff to permit all persons to continue in the enjoyment of such liberties as they had hitherto possessed, till the king's coming (that is, the coming of the king's court) into that county, or the coming of the justices itinerant *ad omnia placita*, or till the king gave some further direction therein. The form of another writ was prescribed, which directed the sheriff to make proclamation for all persons claiming any liberties by royal charter, or otherwise, to come before the justices *ad primam assisam*, *cum in partes illas venerint*, to show *quomodo hujusmodi libertates habere clamant*, et QUO WARRANTO, etc.

Thus, instead of a special writ, which called upon a particular person to set forth his title, and which was a sufficiently severe investigation, all persons were by one general proclamation put to defend their rights, and show their titles: war was at once declared with all the liberties and franchises in the kingdom, without stating any specific ground of complaint. The statute, however, that was made to maintain the proceeding which was hereby set on foot, declares (a), that should any object that they were not bound to answer without an original writ; yet, if it appeared they had usurped any liberty upon the king or his ancestors, they should answer immediately without any writ, and abide the judgment of the court: but if they said their ancestor died seized of the liberty, then they were so far distinguished from the foregoing description of persons; that the king was to award an original writ out of chancery, summoning the party to appear *in proximo adventu nostro, vel coram justitiariis, etc., cum in*

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(a) It may be convenient here to quote from Britton, in which this statute seems incorporated. In treatises on the articles of inquiry at the eyre, it is said, "Soit enquis quex de counte cleyment return de nos brefs ou franchises, etc., de infangenthes ou de outfanganthefe (punishment of thieves) et feires ou marches (fairs or markets) ou de aver wreck de meer, ou murage ou pontage, etc.," and then provision is made for the procedure at the eyre, that parties were to be summoned; "*et com eils viendront*," and thus it proceeds as in the present statute, another instance of the incorporation of statute law in Britton.

*partes, etc., ostensurus* QUO WARRANTO *tenet visum franciplegii in manerio de N., etc.*, upon which there was to be the same process as in the circuit of the justices. This was, in truth, nothing more than the old common law writ and proceeding.

After this statute, great numbers of writs of *quo warranto* were brought against prelates and others of the clergy, and against temporal lords and others, for their liberties, franchises, and privileges of various kinds. These rigorous proceedings were borne with great impatience. While this unpopular course was taken by the king's officers, complaint was made thereof in the parliament of the eighteenth year of this king; in consequence of which there passed the *statutum de quo warranto* NOVUM, as it is called in respect of that made in the sixth year at Gloucester. Forasmuch, says this act, as writs of *quo warranto*, and judgments to be given thereon, were greatly delayed, because the justices in giving judgment were not certified of the king's pleasure therein (it not being usual, it seems, for judgment to be given till the justices were certified of the king's pleasure by a writ *de libertatibus allocandis*, founded probably upon the statute made at Gloucester); he therefore, of his special grace, and for the affection he bore to his prelates, earls, barons, and others of his realm, granted as follows: That all persons who could make out by an inquest of the country, or otherwise, that they and their ancestors, or predecessors, had enjoyed and used any liberties, whereof they had been impleaded by any of those writs, *ante tempus regis Richardi, consanguinei sui, aut toto tempore suo, et hucusque*, and had so continued till then, without misusing them, should be adjourned to a future day before the same justices, within which time they might attend the king with the record of the justices, signed with their seal, and also the return; and the king would, by his letters-patent, confirm their titles. It was also enacted, that those who could not prove the seisin of their ancestors or predecessors in the above way, should be dealt with in the regular course of law:<sup>1</sup> to which the king added this gracious clause, that where judgments had been given against certain persons within a particular time, he would grant them the benefit of the above provision.

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<sup>1</sup> Sect. 1.



To spare the expenses attending such a proceeding as this, where the contest was with the crown, it was ordained, that, in future, pleas of *quo warranto* should be pleaded and determined in the *itinera* of the justices; and that all pleas then depending should be adjourned into the counties, till the coming of the justices.<sup>1</sup> This is followed by another statute of *quo warranto*, making and confirming a restitution to such as had lost their liberties by judgment, and securing others who came within the grace held out by a clause in the former act. Thus was this terrible inquiry by *quo warranto* for a time let loose upon the great men of the nation, till the king at length consented to suspend it, and wholly to abolish the more oppressive parts of that proceeding.

The statute *Quia emptores* is entitled in the parliament roll, from the subject of it, *statutum regis de terris vendendis et emendis*. We have before Statute of Quia emptores. seen the restraint imposed on the alienation of land by *Magna Charta*,<sup>2</sup> with the practice that still subsisted during the last reign,<sup>3</sup> and which gradually led to a violation of that chapter in the Great Charter. As the consequences of this practice were more felt, complaint thereof was made in parliament, and the following statute was passed in order to put this matter upon a new footing. Forasmuch, says the act, as purchasers of lands and tenements of the fees of great men, and other lords, have entered into their fees, to the prejudice of the lords; these purchasers having bought the lands and tenements from the freeholders of such great men to hold of their feoffors, and not of the chief lords of the fees; so that the chief lords have lost their escheats, marriages, and wardships of such lands and tenements, which was a grievance to the great landholders of the kingdom, who thought themselves in a manner disherited by such defalcations in their seigniories: for these reasons it was, at their instance, ordained, that, in future, it should be lawful for every freeman to sell, at his pleasure, his land or tenement, or part thereof, so that the feoffee should hold the land or tenement of the chief lord by the same services and customs by which the feoffor before held it.<sup>4</sup>(a) Thus

(a) It was held by the learned Littleton that at his day a man could not give land to hold in frankalmoine to an abbey in fee, for by the statute of

<sup>1</sup> Sect. 1.

<sup>2</sup> *Vide ante*, c. v.

<sup>3</sup> *Ibid.*

<sup>4</sup> Ch. 1.

every freeholder, instead of the partial permission he before had under *Magna Charta*, was at liberty to alien *all* his land, provided he made a reservation of the services, not to himself, but to the chief lord; so that the practice of creating new seignories now ceased, and every tenancy in the kingdom was ever after to continue a part of the same fee or manor to which it then belonged; for, if no new reservation of services could be made, no new manor could be created.

This act has two other chapters: one of them is only explanatory of the former, and directs, that where a freeholder sold part only of his lands or tenements, the feoffee should be immediately charged with the services due to the chief lord, in proportion to the quantity of the land or tenement; and the chief lord was to receive it at the hands of the feoffee.<sup>1</sup> It was added<sup>2</sup> by way of caution, that this act should not be construed as authorizing the purchase of lands or tenements in mortmain;<sup>3</sup> and that it should relate only to land held in *feodo simpliciter*; or, as it has since been called, *fee simple*.

The fourth act passed in this parliament is the *modus levandi fines*: stating the course to be observed in levying a fine; for so this transaction was now usually called. The little information to be found, before this statute, on the subject of fines, and the manner of transacting them in court, is derived from Glanville.<sup>4</sup> What is said by Bracton on this ancient security is confined to the nature of claim, and the consequence of *non-claim*.<sup>5</sup>

The passing of fines hereafter rested upon the directions given by this act. It directs, that when the original writ was delivered in presence of the parties, before the justices, a countor should say thus: *Sire justice, congé d'accorder* (this was praying the *licentia concordandi*, on which a fine was due to the king); then the justice was to say, *Que donera, sire Robert?* naming one of the parties. When they had agreed upon the sum of money to be given to the king,

tenures he should hold of the lord paramount, of whom the donor held, and it was otherwise before the statute called *Quia emptores terrarum*, etc., (12 Edw. IV., 3, 4). Hence it is obvious that the statute was partly aimed at the religious houses and the alienation of land to the clergy and other ecclesiastical persons.

<sup>1</sup> Ch. 2.

<sup>3</sup> *Vide ante*, c. ix.

<sup>5</sup> *Vide ante*, c. vii.

<sup>2</sup> Ch. 3.

<sup>4</sup> *Vide vol. i.*, c. iv.

then the justice was to say, *Oriez la peez* (that is, rehearse the concord); upon which the countor was to say, "Inasmuch as peace is thus licensed unto you; William and Alice, his wife, who are here present, do acknowledge the manor of *B.*, with its appurtenances contained in the writ, to be the right of Robert, *come cell' que il ad de lour done*, as that which he hath of their gift, to have and to hold to him and his heirs, of William and Alice, and the heirs of Alice, as in demesnes, rents, seigniories, courts, pleas, purchases, wards, marriages, reliefs, escheats, mills, advowsons of churches, and other franchises and free customs belonging to the said manor, paying to Thomas and John, and their heirs, as chief lords of the fee, certain services and customs due for all services."

This was the method of proceeding to be observed in future, and fines were henceforward more uniform in their practice than they had been at the common law. It was declared to be the usage of the common law not to suffer a final accord to be levied in the king's court without a writ original; which was to be returnable before four justices in the bench or eyre, and not elsewhere: it was also to be in presence of the parties named in the writ, who were to be of full age, of good memory, and out of prison; and if a woman *covert de baron* was one of the parties, she was first to be examined by the four justices above mentioned. The reason of such solemnity, says the statute, is, because a fine is so high a bar, of such great force, and of so strong a nature, that it concludes not only parties and privies thereto, and their heirs, but all other people of the world, being of full age, out of prison, of sane memory, and within the four seas at the time of the fine levied, if they make not the claim of their action on the foot<sup>1</sup> of the fine, within a year and a day. In these declarations about *non-claim*, the statute seems to be framed on the principles of the common law.<sup>2</sup>

In the 27th year of this king, there was another statute upon this subject, entitled *statutum de finibus levatis*, by which it was intended to abolish a *De finibus levatis.* practice which had somewhat invalidated fines, and rendered them a less valuable security than they had before been considered. The statute says, that *fines* levied in the

<sup>1</sup> *Sur la pie* are the words in the original; some copies read *pur la pays*.

<sup>2</sup> *Vide ante*, c. vii.

king's court ought to make, and did make, an end of all matters; and were so called, because, next to the duel and great assize, *ultimum locum, et FINALEM teneant, et perpetuum*: but that in the late turbulent reign of Henry III. and since, the parties to a fine, and their heirs, contrary to ancient law and practice, had been admitted to annul and defeat such fine, by alleging, that before the fine was levied, and at the levying thereof, and since, the demandants, or plaintiffs, or their ancestors, were always seized of the lands contained in the fine, or of some parcel thereof; which fact used to be tried by a jury, and, if found to be true, was considered as annulling the fine (a). Thus where a fine had been levied to a person already in possession, merely to confirm and establish his title, it was rendered

(a) A fine could be avoided by the heir of one who was party to it, by saying that he himself was seized at the time of the fine being levied (*Year-Book*, 46 *Edw. III.*, fol. 14). And a stranger to the fine could say that the parties to it had nothing in the land (*Year-Book*, 40 *Edw. III.*, 32; 42 *Edw. III.*, 20). The fine was effectual if one of the parties was seized of the land at the time of the fine being levied (*Year-Book*, 41 *Edw. III.*, 14); but the consor could not allege that he had nothing in the land, in order to defeat the fine (50 *Edw. III.*, 5). Fines were made use of for the purpose of settlements, and the originals of our modern settlements are to be found in cases upon fines, which were often made with several limitations of estates, as to one for life, their remainder to another in tail, and in default of issue to another for life, and so on (*Year-Book*, 43 *Edw. III.*, fol. 13). This statute was incidentally expounded in a case in the reign of Edward III., where it was said, the statute speaks generally that those who are parties to a fine, or their heirs, shall not be received to avoid the fine by saying that their ancestors had nothing in the land, etc. Yet he shall be received to say that his ancestors had nothing at the time of levying the fine, since he himself was seized. To which it was answered, that this was because he showed the right and the possession himself at the time of the fine being levied, and before the fine (*Year-Book*, 46 *Edw. III.*, fol. 3). It would appear that the statute was only declaratory of the common law, for the general principle of law always was that records bound those who were parties or legal privies, *i. e.*, privies in estate, a principle equally applicable to recoveries. The very object of fines or recoveries was to bind the heirs of the consor or recoveree. In a case in the reign of Edward IV., it was held that a party, heir of the recoveree, might plead that his ancestor was not tenant at the time of the recovery, whereby it was void in law. It was urged that this was not admissible, as the ancestor had appeared and acknowledged his seisin, and that the heir could not deny it, any more than he could allege a continuance of possession in his ancestor in the case of a fine, for it was contrary to the record. But it was answered by several of the judges, and among them Littleton, that the party could show that the recovery was void by reason that there was no tenant of the freehold against whom it had been recovered, and as to the not alleging continuance of possession against a fine, that, it was observed, was by virtue of the statute, *de finibus*, which, however, was denied by another judge, who said the statute only affirmed the common law (12 *Edw. IV.*, fol. 15).

entirely ineffective. To put an end to this practice, it was ordained, that such exceptions, answers, or inquisitions of the country should not, in future, be admitted, contrary to such acknowledgments and fines. The statute further directs, that such notes and fines, as were in future levied in the king's court should be read openly and solemnly, and that in the meantime all pleas should cease; and this was to be on certain days of the week, according to the discretion of the justices.<sup>1</sup> Thus was the doctrine of fines settled in the way it continued for many years after.

To return to the 18th year of this king, and go on with the remaining statutes, in the order in which they were passed. In the 20th year there were six statutes. The first is called the statute of vouchers; the next, of waste; the third, *de defensione juris*: these are followed by three upon the subject of the coin. The first three were made for improving some provisions of stat. Westm. 1. Thus the statute of vouchers extends the privilege given to a demandant by the 1st Westm.<sup>2</sup> to counterplead a warranty, if the warrantor was absent, to cases where he was present also. Vouching to warranty had been much abused by litigious men, who would vouch some indigent person; and if such vouchée entered into the warranty, there could be no counterpleading his title before this act, but the duel might be waged, and the demandant obliged to rest the determination of the question upon that decision: all which was prevented in future by this act.

The statute of waste is an authoritative decision in parliament of a point arising in a cause then pending in the bench, upon which occasion the parliament declared how the law should be held in future. The case in the bench was of an action of waste, where the plaintiff died before judgment, and his heir brought a fresh action against the defendant; to which the defendant made answer by saying, he ought not to answer for waste done before the inheritance descended on the plaintiff, and therefore demanded judgment of the action. Upon this some of the justices were of opinion, that the writ of waste, being a writ *de transgressione*, none should obtain redress and recompense thereby, but he to whom, and in whose time, the trespass was done: others, and many of the king's

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<sup>1</sup> Ch. 1.

<sup>2</sup> Viz., ch. 40. *Vide ante*, 407.

counsel, were of a contrary opinion. To settle this doubt it was now ordained by parliament, that an heir (in whose ward soever he might be, and whether within age or not) should have his recovery by a writ of waste in the above cases, and those which were similar, as well of waste in the time of his ancestor, as since the descent upon himself; and should recover the place wasted, and damages as ordained by the stat. Westm. 2.<sup>1</sup> The justices were directed to proceed in that manner in the cause then before them, and in all others. This statute is one instance of the recourse which the courts used to have to the parliament for deciding doubts arising in suits before them.

It was found that abuses followed from the liberty given by stat. Westm. 2.<sup>2</sup> of receiving persons before judgment to defend the inheritance, where actions were brought against tenants *per legem Angliæ*, in tail, in dower, for life or years. To correct these, it was ordained by the statute *de defensione juris*, that the person so received should find such sufficient security as the court should think fit, to satisfy the demandant of the value of the land, from the day he was received till the final judgment. If the demandant recovered, he was to be amerced; and if he had not wherewithal to pay, he was to be committed to prison at the king's pleasure; though he was to go quit, if he could make his title to have been as he stated it when he was received.

Of the three provisions about the coin, the first is entitled *statutum de monetâ*; the second, *statutum de monetâ parvum*. These were against the importation of clipped and counterfeit money. This crime, by the latter act, was punished, for the first offence, with forfeiture of the money, as well in merchants negotiating as importing it; for the second offence, they were, besides, to forfeit all other goods that they had about them; for the third offence, to be at the king's mercy for their bodies and all their goods. The next provision is entitled, *articuli de monetâ*, and is upon the same subject of importing clipped money, which, it seems, was the most common offence against the coin in those days. To bring all the acts upon this article into one view, we shall mention another public instrument in the 27th year of this king, entitled,

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<sup>1</sup> Viz., ch. 14. *Vide ante*, 479.

<sup>2</sup> Viz., ch. 3. *Vide ante*, 494.

*statutum de falso monetâ.* It was therein ordained, that persons importing certain coins, called *pollards* and *crokards*, should forfeit their lives and goods, and everything that they could forfeit. It was likewise directed, that officers should be appointed at the seaports to search all persons landing there, to see if they had any unlawful money.

Thus far of the statutes in the 20th year of this king. In the 21st there are two: one entitled, *de iis qui ponendi sunt in assisis* (of which we have before spoken);<sup>1</sup> the other, *de malefactoribus in parcis*. We have before seen with what solicitude the great lords had pressed for laws to punish those who invaded the places allotted for their rural amusement or accommodation.<sup>2</sup> The act last mentioned was for the punishment of persons trespassing in forests, chases, parks, and warrens; and it ordains, that such persons, if they fled, or defended themselves against the warrener, or parker, and were killed, the persons attempting to take them should not lose life or limb, or suffer any other punishment for so doing: but foresters and others were by the same act cautioned that, under pretence of the like trespassing, they did not molest or hurt any one quietly passing, for that in such cases execution should be done as before.

In the 24th year is the statute of the writ of *consultation*, before mentioned;<sup>3</sup> in the 25th, the *confirmationes Chartarum*, and the excommunication of those who offended against the Charters; both which have been considered before.<sup>4</sup> Then comes the statute *de finibus levatis*, 27 Edw. I., the first chapter of which, and that which gives the title to the statute, has been already noticed; as has the third and fourth<sup>5</sup> concerning justices of gaol-delivery and of *nisi prius*. Chap. 2 only remains to be mentioned, which puts sheriffs under some check in their accounts of issues, fines, and the like. It ordains, that a baron and a clerk of the exchequer shall go once a year into the country, to enroll the names of such as had paid, and hear and determine complaints against sheriffs. The other statutes in this year are, one entitled *ordinatio de libertatibus perquirendis*; and another, which has just been mentioned, *de falso monetâ*.

<sup>1</sup> Viz., ch. 3. *Vide ante*, 483.

<sup>2</sup> *Vide ante*, c. v.

<sup>3</sup> *Vide ante*, 522.

<sup>4</sup> *Vide ante*, 384.

<sup>5</sup> *Vide ante*, 473.

The *ordinatio de libertatibus perquirendis*<sup>1</sup> was so entitled, because it directs some course to be taken for facilitating the transactions of men in several instances where the interest of the crown was concerned. First, it was ordained, that persons who would purchase a new park, and religious men who would amortise lands or tenements, should have writs out of the chancery to inquire upon the points usual in such cases; and it was directed, that all such inquisitions, if of lands or tenements worth more than twenty shillings *per ann.* should be sent to the exchequer, and there (if the inquests had passed in favor of the purchasers) the parties were to pay their fine for the amortisement, or for the emparking; afterwards the inquests were to be sent to the chancellor, or his deputy,<sup>2</sup> who should accept a reasonable fine, according to the quantity or the thing to be conveyed, and then make livery thereof.<sup>3</sup> The same course was to be taken by those who would purchase lands or tenements held of the king in chief.<sup>4</sup> The writ here alluded to was that of *ad quod damnum*, as it has since been called, which has not been mentioned before, notwithstanding it was probably a writ at common law (a). It was directed to

(a) The author hardly takes adequate notice of this important writ, which was of far more general application than would be imagined from this vague and incidental mention of it, and was, moreover (as many of our ancient writs and proceedings were), the foundation of some of our most important modern statutes. The writ of *ad quod damnum* was undoubtedly of common law origin (as may be inferred indeed from the incidental way in which it is mentioned in the statute), and it lay as a kind of inquisition to ascertain whether by any proposed proceeding the crown or the public would be damaged (*Fitz. Nat. Brev.*) "*Ad quod damnum* is a writ which ought to be sued before the king grants certain liberties, as a fair, market, or such like, which may be prejudicial to others. And by it shall be inquired if it should be a prejudice to grant them, or to whom it shall be prejudicial, and what prejudice shall come thereby" (*Termes de la Ley*, p. 15). There is hardly any writ of which there has been a wider or more expansive modern application. Thus one application of its principle was in the statutable provisions to assess compensation to owners of lands taken for highways or other public purposes, of which, perhaps, the earliest instance was the stat. 8 and 9 Wm. III., c. xvi. Another and more direct application of it was to ascertain whether the public or the inhabitants would be injured by the stoppage or diversion of a highway. In this respect it was superseded by the Highway Act, 13 Geo. III., which provided a special proceeding for the purpose, substituting the authority of the justices of the peace for an inquiry before a jury (*Davison v. Gill*, 1 *East's Reports*). The mode of proceeding presented in the Highway Acts was substituted in lieu of the old writ of *ad quod damnum*, which had become inconvenient from the expense and difficulty with which

<sup>1</sup> Stat. 27 Edw. I., st. 2.<sup>2</sup> *Lieu-tenant*.<sup>3</sup> Sect. 1.<sup>4</sup> Sect. 2.



the escheator, to inquire whether it would be *to the damage of the king*, or of others, should he permit such a one to alien in mortmain, or otherwise sell his land. After this statute, when a person wanted a license for one or the other, he used to sue to the king to have this writ out of chancery; and upon the return of it, if favorable, the license used to be granted on the terms mentioned in the statute.<sup>1</sup>

As a check upon the abuse of this act, it was ordained by statute 34 Edw. I., st. 3, touching the king's grants to be made upon inquests returned into the chancery concerning lands to be amortised (which plainly means the writ of *ad quod damnum*), that where there were mesne lords, nothing should be done except the religious persons could show to the king the assent of such mesne lords, in letters-patent under their seals; and that nothing should pass where the donor did not reserve somewhat to himself,<sup>2</sup> or there was no original writ, or the writ did not make mention of all the circumstances required by the new ordinance of the king, meaning the before-mentioned statute.

It was further ordained,<sup>3</sup> that people living beyond sea, and having lands, tenements, or reuts in England, if they would purchase writs of protection, or make general attorneys, should be sent to the exchequer, and there pay their fine for the same; also persons that could not travel, or who lived at a great distance, and were plaintiffs or defendants, were to have a writ out of chancery to some sufficient man, who should be received as their attorney when needful.<sup>4</sup>

In the twenty-eighth year we find three statutes: one called the statute of *wards and relief*; the next, for *persons appealed*; the third, the famous statute of *Articuli super*

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it was attended, and a more compendious and easy method was given; but still the substance of the old proceeding was to be preserved in all essential points (*Davison v. Gill, East, 70*). This writ therefore affords an apt and remarkable illustration of the adaptation of ancient and obsolete proceedings to the exigencies of more modern times.

<sup>1</sup> F. N. B., 509.

<sup>2</sup> This provision seems to take away the power of making any more gifts *in puram et perpetuam eleemosynam*. Indeed, this seems to have been before accomplished by the statute *Quia emptores*; which, by requiring the accustomed services to be reserved to the chief lord, takes away the liberty of making a gift with an exemption from service.

<sup>3</sup> St. 27 Edw. I., st. 3.

<sup>4</sup> *Vide ante, c. v.*

*Chartas.* The first of these seems to be nothing more than a declaration of the common law in several points relative to ward and relief. In the first place it declares, that where a relief was given, there wardship was incident, and the contrary; that such as held by *serjeanty* to go with the king in his host, were to pay ward and marriage, as incident thereto; that those who held by *petit serjeanty*, as to bear shield or spear in the king's host (which, however, does not agree with Bracton's description of *petit serjeanty*),<sup>1</sup> should pay neither ward, marriage, nor relief; that a *free sokeman* was not to give ward nor relief, but was to double his rent after his ancestor's death, according to what he had been used to pay to his lord, and was not to be immeasurably burthened. Some declarations were made as to the nature of wards. It declares, that there were two kinds of writs to recover wards—one where the lands were holden by *knight's service*, the other where lands were holden in *socage*; that the ward of the former belonged to the lord till the heir was twenty-one years old, and also the marriage, which was to be, as ordained by the Great Charter, without disparagement; but that the ward of an heir in *socage*, if the land descended *ex parte matris*, belonged to the next friend on the father's side, and so *vice versâ*.<sup>2</sup>

It further declares, that there were three ways in which a writ to recover ward might be brought: one, where the ward both of the land and the heir was demanded; this was where a tenant in knight's service died, and the chief lord demanded the heir and land in ward. Another way, says the statute, is where a man is infeoffed of a piece of land by one, and, after that, of another piece by another man: here the second lord could not have the writ, because the ward belonged to the lord who made the first feoffment.<sup>3</sup> The third way was, when a person possessed the land in ward, but had not the heir, then a writ would lie to demand the heir only.<sup>4</sup> These are the declarations made by this statute. The statute for persons appealed has been mentioned before.<sup>5</sup>

The statute of *Articuli super Chartas* was made, as has

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<sup>1</sup> *Vide ante*, c. v.

<sup>2</sup> For the nature of *ward* and *marriage* at common law, *vide ante*, c. v.

<sup>3</sup> *Vide ante*, c. v. and c. ix.

<sup>4</sup> Of the writ of ward, *vide ante*, c. ix.

<sup>5</sup> *Vide ante*, c. ix.

been before said, to supply certain defects in the Charters; and therefore some of its regulations are upon the same subjects with many of that famous instrument. These we shall divide into such as relate to the king, or were of a miscellaneous nature, and such as related to the administration of justice, civil or criminal.

*Statute of  
Articuli super  
Chartas.*

Of the former kind, the first that presents itself is a string of regulations concerning that heavy grievance on the subject, purveyance; the king's household officers taking provisions either without paying anything for them, or paying only what was very much under their value. It was now ordained that none should take such prises (for so they were called) but only the king's takers and purveyors for his house; they were to take nothing, but for the use of his house; and all meat, and drink, and the like they were to pay or make agreement for. They were also to have the king's warrant, containing what things they should have authority to take, and this they were to show before they took anything. They were to take only what was sufficient for the king, his household, and children, and for none who were upon wages, or any other; and they were to account in the king's *hostell*, or in the wardrobe, for all things taken. If any took things contrary to the above restrictions, complaint was to be made to the steward and treasurer of the king's *hostell*, and the truth was to be inquired of; and if any was attainted of breaking the above regulations, he was to make agreement with the party, be put out of the king's service, and remain in prison at the king's pleasure. If any one took prises without a warrant, he was to be arrested and put in prison, and if attainted thereof, he was to be treated as a felon, provided the goods required it, that is, if they amounted to more than twelve-pence.

This was the order to be observed in taking meat, drink, and other small things; but as to prises made in fairs, in towns, and in ports, for the king's great wardrobe, the takers were to have the common warrant under the great seal, as before. What they took was to be under a sort of check and control from the mayor, bailiff, or keeper of the fair, and accounted for to the master of the wardrobe.<sup>1</sup>

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<sup>1</sup> Ch. 2.

It was ordained that distresses for the king's debts should not be made upon beasts of the plough, so long as any other could be found, under pain of the penalty inflicted by the statute *de districtione scaccarii*, 51 Hen. III. Too great distresses were not to be made for the king's debts, nor were they to be driven too far, which also had been provided for by the said former act.<sup>1</sup> Further, if a debtor could find able and sufficient sureties until some day before the day limited for the sheriff, within which a man might purchase a remedy to agree for the demand, the distress was to be in the meantime released.<sup>2</sup> Upon this clause a writ was framed, commanding the sheriff to accept sureties, which, if he refused, there would issue process of attachment against him.<sup>3</sup>

Some further provisions were made for regulating the king's revenues. To redress waste done in the king's wards by escheators and sub-escheators, a writ of waste was given, as in other cases of waste.<sup>4</sup> And where land had been seized into the king's hands by escheators or sheriffs, and the profits taken, and it was afterwards removed out of the king's hands, because he had no right to seize it; the issues in such case were to be fully restored to the person to whom the land ought to remain, for the damage sustained.<sup>5</sup> Concerning the removing the king's hands by a writ called an *amoveas manum*, more will be said in the next year, when a statute was made on that subject.

The principal officers for the preservation of the peace of the county, or for the execution of justice, were, by virtue of the king's writ, chosen by all the freeholders of the county in open county court. It was in confirmation of this ancient usage, which, perhaps, in this instance had been violated, that it was now declared by parliament, that the king had granted to his people that they should, if they pleased, have election of their sheriff in every county where the shrievalty was not of fee.<sup>6</sup> By another chapter<sup>7</sup> of this statute it was ordained, that as the king had granted the election of sheriffs to the people of the county, they should choose such persons as would not overcharge them, or put officers in authority for rewards or bribes, nor lodge too frequently in one place, nor upon

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<sup>1</sup> *Vide ante*, 321.

<sup>2</sup> Ch. 12.

<sup>3</sup> 2 Inst., 565.

<sup>4</sup> Ch. 18.

<sup>5</sup> Ch. 19.

<sup>6</sup> Ch. 8.

<sup>7</sup> Ch. 13.

poor persons or men of religion. To avoid one great occasion of the oppressions exercised by sheriffs, it was ordained<sup>1</sup> that the bailiwicks and hundreds of the king, or of other great lords, should not be let to farm, as they commonly were, at over-great sums, which gave occasion to burden the people, that the renters might be enabled to pay their ferms. This was a great evil, and to prevent the extortions to which it led, several acts were made in the subsequent times to correct, and at length to abolish this practice of letting to farm the offices of justice.<sup>2</sup>

The remainder of this statute relates either to the administration of civil justice, or to the criminal law. To begin with the former: We find a provision made for ascertaining the bounds of jurisdiction in the court of the steward and marshal, a court of which nothing hitherto has been said, and the earliest mention of which is in this statute. This seems, like several others, to have been an emanation from the great court called the *aula regis*, so often mentioned, and to have been designed for the sole purpose of determining questions between persons attending the king in his household. Of the nature of this court, and the manner of conducting suits there, more will be said in the subsequent part of this reign: for the present, we shall proceed to examine the statute now made for ascertaining its jurisdiction. It was ordained,<sup>3</sup> that the stewards and marshals (for the statute speaks in the plural number) should not hold plea of freehold nor of debt or covenant, nor of any contract made between common persons, but only of trespass done within the *hostell*, and other trespasses done within the verge, and of contracts and covenants that any one of the king's *hostell* should have made with another of the same *hostell*, and in the same *hostell*, and nowhere else. They were to hold no plea of trespass but that which should be attached by them before the king departed from the verge where the trespass was committed; and they were to hold plea thereof speedily, from day to day, so that it might be pleaded and determined before the king departed out of the limits of the same verge where the trespass was done; and if it could not be determined within the limits of the same verge, then the plea before

Court of the  
steward and  
marshal.

<sup>1</sup> Ch. 14.    <sup>2</sup> Stat. 4 Edw. III., c. xv., and 4 Hen. IV., c. v.    <sup>3</sup> Ch. 3.

the steward was to cease, and the plaintiffs were to resort to the common law. It was enacted, that the steward should not in future take acknowledgments of debts, or other things, but of persons of the *hostell*, as aforesaid; nor hold any other plea, by obligation *made at the distress* of the stewards and marshals (the nature of which *distresses*, to give jurisdiction to this court, will be considered hereafter); and if the stewards or marshals did anything contrary to this act, it was to be holden for void.

The steward and marshal had a criminal as well as civil judicature, and this, like the former, was confined to the verge; but it happened that many felonies went unpunished, because the coroners of the county had not authority to inquire of felonies done within the verge, but only the coroner of the king's house; and as this never continued long in one place, there sometimes could be no regular trial, no time to put the felon in exigent, and proceed to outlawry. Again, none of the matters cognizable in this court could be presented in the eyre. These failures in the administration of justice tended greatly to obstruct the well-ordering of the police. To correct these in future, it was ordained, that from thenceforth, in cases of the death of a man, it should be commanded to the coroner of the county, that he, together with the coroner of the king's house, should do as belonged to his office, and make enrolment; and those matters which could not be determined before the steward, as where the felon could not be attached, and the like, should be remitted to the common law, so that exigents, outlawries, and presentments should be made thereon at the eyre by the coroner of the county in the same manner as presentments of felonies done out of the verge; however, there was not, on this account, to be any neglect in making fresh attachments against felons by the officers in the verge.

After this provision was made to limit the court of the steward and marshal, it was moreover ordained, that no common plea should thenceforth be held in the exchequer contrary to the form of the Great Charter.<sup>1</sup> From whence it seems, though the words *curia nostra* in the Charter were construed by the legislature to mean the exchequer, as well as the court properly so called, conformably with

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<sup>1</sup> Ch. 4.

the account we have before given of this court,<sup>1</sup> yet, that suits between party and party were still entertained there. This had been complained of, and the legislature endeavored to remedy it in the statute of Rutland, 10 Edward I., where the king says, that whereas certain pleas have been hitherto held in the exchequer, which did not concern us or our ministers of the exchequer; by which means our pleas, and the business of the people, *coram nobis*, are improperly prorogued and impeded, therefore we are willing, and ordain, that no plea be held or pleaded in the exchequer aforesaid, unless it specially concerns *nos vel ministros nostros prædictos*; which statute was thereby directed to be enrolled in the exchequer, for the government of the barons. Thus did the court of exchequer, by these two statutes, seem to be completely deprived of all cognizance, except in the suits of the king, and his ministers and officers; but we shall see hereafter, that this last branch of their jurisdiction was made use of, in subsequent times, to introduce all sorts of causes, under the pretence that they affected the king's ministers or officers.

The following chapter says, that, on the other hand, the king willed that the chancellor, and the justices *de soen banc*, should follow him; so that he might have at all times near him some sages of the law, who were able duly to order the business that came into the court, at all times when need should require.<sup>2</sup> This probably required no more than what was the usage before; as, where the court was, there, of course, were to be the justices. However, when it was thus ordained that the chancellor, who kept the great seal, should always attend the king, it might very easily be declared, as it was in the next chapter, that no writ touching the common law should thenceforth issue under the petit seal,<sup>3</sup> as very likely had before sometimes happened, through the absence of the chancellor.

It was moreover declared by this statute, in confirmation of the common law,<sup>4</sup> that in pleas of land, the summons and attachments should contain the term of fifteen days at least, according to the common law; unless in attachments of assizes taken in the king's presence,<sup>5</sup> or in pleas before

<sup>1</sup> Vide vol. i., c. ii.

<sup>2</sup> Ch. 5.

<sup>3</sup> Ch. 6.

<sup>4</sup> Vide c. vii.

<sup>5</sup> Lord Coke says, that these words should be added, "or before the justices of common bench." It is true, indeed, that the term of fifteen days was not allowed in case of disseisin at common law. 2 Inst., 567. Vide ante, c. vii.

justices itinerant during the eyre.<sup>1</sup> It was directed also,<sup>2</sup> that the stat. Westmin. 2, c. xxxix., about false returns, should be faithfully executed. There was a provision<sup>3</sup> about the qualification of jurors, which has been noticed in another place.<sup>4</sup> This was the whole of the regulations made as to civil justice, except only a law respecting the jurisdiction of the Constable of Dover Castle; it was thereby declared, that he should not plea, within the castle gate of any foreign matter of the county, except it related to the keeping of the castle; nor was he to distrain the inhabitants of the Cinque Ports to plead anywhere, or anywise, than according to their charters of ancient franchises confirmed by *Magna Charta*.<sup>5</sup>

The alterations in the criminal law ordained by this statute, consist in two provisions about conspirators and maintainers, and one about the statute of Winchester. It seems a writ had been framed by *Gilbertus de Rouberie, clericus de concilio domini regis*, and allowed by the authority of parliament, in the 21st year of this king,<sup>6</sup> though this statute is usually placed in the 33d year.<sup>7</sup> This writ was against conspirators, inventors, maintainers of false quarrels,<sup>8</sup> and partakers thereof, and brokers of debates, and was as follows: *Si A. fecerit, etc., tunc pone, etc., quòd sit coram nobis in octabis sancti Johannis Baptistæ, ubicunq; tunc fuerimus in Angliâ, ad respondendum prædicto A. de placito conspirationis et transgressionis, SECUNDUM ORDINATIONEM NOSTRAM NUPER INDE PROVISAM, sicut idem A. rationabiliter monstare poterit, quòd ei inde respondere debeat, et habeas ibi nomina plegiorum, et hoc breve, etc.* In allusion to this writ, it is said, in the statute we are now speaking of,<sup>9</sup> that, as to conspirators, false informers, and evil procurers of dozens, inquests, assizes, and juries, the king had provided a remedy for the plaintiffs by a writ out of the chancery. But, notwithstanding this provision, says the statute, the king willed, that his justices of the one bench and the other, and justices assigned to take assizes, when they came into the country to discharge their office, should, upon complaint, award inquests therein without writs, and do right to the plaintiffs without delay.<sup>10</sup>

We have before mentioned several statutes against main-

<sup>1</sup> Ch. 15.

<sup>4</sup> *Vide ante*, c. x.

<sup>7</sup> St. 3.

<sup>10</sup> Ch. 10.

<sup>2</sup> Ch. 16.

<sup>6</sup> Ch. 7.

<sup>8</sup> That is, suits.

<sup>3</sup> Ch. 9.

<sup>6</sup> 2 Inst., 562.

<sup>9</sup> Stat. art. sup. cart.



tenance of suits and champerty, in the parliament of Westm. 1, and Westm. 2;<sup>1</sup> but these were all confined to certain ministers therein named, as the chancellor, treasurer, justices, the king's counsellors, clerks of the chancery, of the exchequer, and of justices, and to those of the king's household, clergy or lay. An act was now made in general terms, which declares, that *nul ministre, ne nul outre*, should take upon him a business in suit, to have part of the thing in question. But this was not to prohibit any one from having the counsel and advice of countors and learned men for his fee, nor of his parents or friends.<sup>2</sup> Some further notice was taken of these offenders in the subsequent part of this reign.

Because crimes and disorders were thought to have increased through a relaxed police, it was ordained, that the statute of Winchester should be sent again into every county, to be read and published four times a year, and kept as strictly as the two Great Charters, under the pains therein limited. For the observance and maintenance of this statute, it was ordained, that the three knights assigned in the county<sup>3</sup> to redress offences against the charters, should have charge of this also.<sup>4</sup> This statute concludes with some very minute regulations for assaying vessels of gold and silver. No vessel of silver was to pass out of the hands of the workers till it was assayed by the wardens of the craft, and marked with a leopard's head; and no gold was to be worked worse than that of Paris.<sup>5</sup>

Thus far of the 28th year: in the 29th, there is a statute on the subject of *amoveas manum*, concerning which we before spoke in the statute of *Articuli super Chartas*.<sup>6</sup> It was now ordained, that in all cases where it appeared by an inquest, taken before the king's escheators, that the land did not belong to the king, a writ should be immediately obtained in chancery, commanding the escheators, *quodd manum suam amoveant omnino*, and cause the land, with all issues and fruits of it, to be restored to the right owner (a). However, if it should afterwards turn out

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(a) Wherever the court saw that the crown, though not a party to the record, was interested in the matter, it might pronounce judgment for the crown; and if a presumption of title appeared in the crown, the court would

<sup>1</sup> *Vide ante*, c. x.

<sup>2</sup> *Ses parentz e ses procheinz*. Ch. 11.

<sup>3</sup> Namely, by ch. 1 of this stat. *Vide ante*, c. x.

<sup>4</sup> Ch. 17.

<sup>5</sup> Ch. 20.

<sup>6</sup> *Vide ante*, 537.

that the king had any title, the person was to be summoned by writ out of chancery to appear *coram rege*, and show cause why the king should not have the custody of the land; and so *toties quoties*, an *amoveas manum* and a *scire faciat* might be had by the party and the king. This was with a *non obstante* of the statute made in the preceding year.

In the 31st year there is a statute entitled *tractatus de ponderibus et mensuris*: in the 33d there are several statutes; one called *statutum de protectionibus*; another, containing a *definition of conspirators*; another, called the *statute of champerty*; another, an *ordinance for inquests*; another, *ordinatio forestæ*; another, an *ordinance for measuring of land*.

We<sup>1</sup> often had occasion to mention the obstruction of justice occasioned by the warrant *de servitio regis*. We now find a similar device under the denomination of *protection*. By means of such a writ, a person was protected against all suits in the king's courts, under pretence that he was engaged in the king's service. The statute relating to protections was to prevent some of the evil consequences attending those privileges. It was now ordained, that, in such case, the adverse party might challenge the protection, upon its being shown in court, and aver that the person was within the four seas, or out of the king's service in a certain place, whence he might very easily have come to attend. This challenge was to be entered, and the matter stand without a day, according to the nature of the protection. When it was resummoned, the party objecting was to demand judgment, and offer to aver his challenge; and if the country passed against him that cast the protection, and he was tenant in the action, the protection was to be turned into a default: if it was the demandant, he was to lose his writ. This was a very beneficial law, at a time when actions were liable to be totally stopped by such regal interpositions.

The<sup>2</sup> next statute defines conspirators in this way: Conspirators are those who confeder and bind themselves

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suspend execution until the party had interpleaded with the crown (*Adam Pennell's Case*, 29 Edward I.; *Maynard's Memoranda in Scaccario*, 42; 7 Hen. IV., 71; 12 Hen. VII., 12; 16 Hen. VII., 12; *E. Stringer's Case*, Lib. Ass., anno 1, fol. 12; *Bro. Abr., de rege inconsulto*).

<sup>1</sup> *Vide ante*, c. vii.

<sup>2</sup> *Vide ante*.

together by oath, covenant, or other alliance, that every of them shall aid and bear the other, falsely and maliciously to indite, or cause others to indite, or falsely to move or maintain pleas; also, such as cause children within age to appeal men of felony, whereby they are imprisoned, and sorely grieved; such as retain men in the country with liveries or fees, to maintain their malicious enterprises; and this was to extend as well to the takers as givers. Again, stewards and bailiffs of great lords, who by their seigniory, office, or power, undertake to bear or maintain quarrels, pleas, or debates that concern other people, and not their lords or themselves, were to be considered as conspirators.

Champerty was defined by the same statute. *Champer-tors*, says the act, are those who move, or cause to be moved, pleas and suits, either by their own procurement or by that of others, and sue them at their own costs, to have part of the land in dispute, or part of the gains (a). This definition of champerty is in the English edition of the statutes, but no original text appears to warrant it; and it is probable, that it was added by some reader to explain what followed; for the next statute is entitled, “the statute of champerty,” and ordains, after alluding to the former acts on that subject,<sup>1</sup> that all persons attainted of such emprises, suits, or bargains, and such as consented thereto, should be imprisoned for three years, and make fine at the king’s pleasure. The ordinance of inquests<sup>2</sup> directs, that when a juror was challenged for the king, the inquisition should not therefore remain; but those who sued for the king should show some cause of challenge, and the truth of such cause should be inquired of according to the custom of the court; after which the inquisition should be proceeded in or not, according as

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(a) This has always been considered a great mischief, tending to encourage litigation, by leading to *speculative* litigation; hence the statute (32 Hen. VIII.) passed in affirmance and furtherance of the old common law on the subject, enacted that no one shall buy or sell, or by any means obtain, any pretended rights or titles to land, etc., unless he who sells or by whom he claims, shall have been in possession thereof, or have taken the rents and profits by the space of a year; and therefore if any one who has the naked right to lands sells them, it will be within the statute, as if a disseizor, before re-entry, sell his land, *although he has a real right to it.*—*Co. Litt.*, 369.

<sup>1</sup> Viz., 3 Edw. I., c. xxv.; 13 Edw. I., stat. 1, c. xlix.; 28 Edw. I., stat. 3, c. xi. *Vide ante*,

<sup>2</sup> Stat. 4.

the challenge was established or not. The *ordinatio forestæ* has been noticed in another place.<sup>1</sup> The last of this year is the statute for measuring of land.

In the 34th year there are several acts. The first is the statute *de conjunctim feoffatis*; the next consists of some articles upon the statute of Winchester; the remaining three have been mentioned in another place,<sup>2</sup> namely, that for amortising lands, that *de tallagio non concedendo*, and the *ordinatio forestæ*.

The statute *de conjunctim feoffatis* was to prevent the delay occasioned by tenants in novel disseisin and other writs pleading that some one else was seized jointly with them.<sup>3</sup> It was enacted, that where such a plea was grounded upon a deed, and the plaintiff would offer to aver by the assize that the day of the writ purchased the tenant was sole seized, the justices might retain the deed safely in their keeping till the assize had tried it; and the person named to be joint-tenant by the deed, as well as the tenant, was to be warned to appear at a certain day, and then to answer to the assize, as though the original writ had been brought against both. It was also enacted, if the plea was found to be false, and for delay, that then, notwithstanding the assize passed for the tenants, yet he who alleged the plea should suffer a year's imprisonment and a heavy fine. Further, the plea of joint-tenancy was no longer to be received from a bailiff, who, we have seen, was in some cases allowed to put in pleas for his principal. If it was found that they were joint-tenants, as alleged, the writ was to abate: the same in writs of mortmain, *juris utrum*, and other real actions.

There is the following provision in this statute concerning the writ of *indicavit*, which is a writ of prohibition that has frequently been mentioned.<sup>4</sup> This writ used to be brought at the commencement of the matter in the spiritual court, so that no room was left to judge whether a writ of consultation should go or not. It was therefore now ordained, that it should not in future go till they had proceeded so far in the court Christian as the *litis contestatio*, and the chancellor could be certified of the nature of the suit by inspection of the libel.

<sup>1</sup> *Vide ante*, c. ix.

<sup>2</sup> *Ibid.*, c. ix.

<sup>3</sup> For the practice on this point, at common law, *vide ante*, c. vi.

<sup>4</sup> *Vide vol. i.*, c. iii.

In the 35th<sup>th</sup> year are two statutes—one, *de asportatis religiosorum*, which has been noticed in another place;<sup>1</sup> the other, which is the last in this reign, is entitled, from the subject of it, *ne rector prosternat arbores in cœmeterio*. Great disputes had happened between rectors and their parishioners, to which of them the trees in the churchyard belonged. It was now declared by this act, that they are sacred property; that they follow the nature of the soil, which is *ecclesiæ dedicatum*, and that the laity had no disposal thereof. However, as they were planted for protecting the church from winds and storms, rectors were prohibited by this act from cutting them, except for reparation of the chancel; nor were they to convert them to any other use, unless the nave of the church needed repair; in which case parsons would do well in bestowing such trees upon the parishioners; though, says the act, we do not command this, but will commend it when done.

We have now travelled through the numerous statutes of this king, and have performed the task, perhaps, with more expedition, and less show of difficulty, than is commonly annexed to the idea of such an undertaking. These statutes have been usually studied with great labor, through the obscurity in which a long lapse of years has involved them; yet the matter of them has been, in all ages of our law, thought so important, as to make that labor be submitted to with patience. These, with the statutes of Henry III., are considered as the foundations of the common law; and indeed, after Glanville and Bracton have been so long neglected, the attention of the student could be directed to nothing more ancient. But with all the importance which is so deservedly attributed to them, and notwithstanding the space which the learning upon them fills, when they are viewed in retrospect by a modern lawyer; yet in the historical account that has been here attempted of our ancient legal polity, they appear comparatively small. It is true, that in the reign of this prince many more statutes were made in a few years, than in many reigns of his predecessors. Those statutes were very important in their object, and many of them very beneficial in their consequences; but antecedent

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<sup>1</sup> *Vide ante*, 452.

to that period, the slow hand of time and experience had been long moulding our laws and judicature into a form capable of receiving the finishing touches which were made by Edward; and in that respect, perhaps, the turbulent and unprosperous reign of his father Henry was more productive than his. This consideration of the subject will account for the appearance which these statutes, and indeed this whole reign, makes, in point of length, when compared with the former.

Indeed, the changes made in our law by the gradual alteration of opinions during this reign, seem to have been very few. The rules and principles which had been so thoroughly weighed and settled in the reign of Henry III. still operated with all their influence, except in those instances where they were modified by the late statutes. Thus we find the law stated by Fleta and Britton to be the same, almost in every particular, as it was delivered by Bracton, with the addition only of the statutes of Edward I. One exception, however, should not be passed over in silence, which is, that in the law of descent, according to Britton, the half-blood was to be excluded,<sup>1</sup> which had not been settled in the time of Bracton.<sup>2</sup>

Very little, therefore, remains to be said on any part of the subject, which was so fully handled in the last reign; and we shall confine ourselves to such heads as were there treated rather cursorily, or not mentioned at all. This will be principally in the jurisdiction of courts, and the nature of personal actions.

We have seen what was said by Bracton upon the different courts;<sup>3</sup> they are mentioned by the author of Fleta more fully in the following way: *Habet rex curiam suam in concilio suo, in parliamentis suis, præsentibus prælatis, comitibus, baronibus, proceribus, et aliis viris peritis, ubi terminatæ sunt dubitationes judiciorum, et, novis injuriis, emerisis, nova constituuntur remedia; et unicuique justitia, prout meruit, retribuetur ibidem.* This is the account of the supreme judicature, in which, it should seem, he includes both the council and parliament(a). The next is

(a) It appears that cases were brought before the parliament in this and the next reign. Geoffrey Scorley and others sued in parliament to have brought up the record of a plea of land, which was before Sir R. de Bellars in the new exchequer, before the king and his council. And it appeared by

<sup>1</sup> Ch. 119.

<sup>2</sup> *Vide ante*, c. vii.

<sup>3</sup> *Vide ante*, c. vi.

the court *coram senescallo suo in aulâ suâ*. This officer is described as filling the place of the chief justiciary (an office that was abolished in the last reign), who used to be named in the writs of the earlier periods, determined the king's own causes, and administered justice without writ.<sup>1</sup> In the place of this great officer was now appointed the *senescallus*, or steward in the household. This court has been mentioned before in this reign, and the nature of its jurisdiction was defined by a particular statute.<sup>2</sup> Fleta describes this court as having jurisdiction of all actions against the king's peace within the bounds of the household for twelve miles, *ubicunq; rex fuerit in Angliâ*; which circuit of twelve miles was called the *virgata regia*, because it was within the government of the marshal, who carried a *virga* as the badge of his office. According to the same authority, these actions might be brought *recenter*, and without writ, *non obstante privilegio, vel libertate alicujus legem regni expectantis*. This jurisdiction was exercised in the *aula regia*, and the steward might associate with him the *camerarius*, the *hostiarius*, or *marescallus*, being knights; or any of them, if they could not all be present.

The next court of the king mentioned in Fleta, is that held in *cancellariâ*. After this, he says, there was a court *coram auditoribus specialiter à latere regis destinatis*, whose office was not extended beyond the justices and ministers of the king. The business of these auditors was not to determine, but to report to the king what they had heard, that he might direct what was proper to be done between

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the record that one E. and others had been cited by writ into the exchequer, to answer to one R. and to the mayor and bailiffs of Southampton, and other men of the commonalty of Southampton, for that whereas they held the port and the vill of the king in fee-farm, rendering £220 to the exchequer, and ought to have all the tolls and customs of the vill and port; the said E. and others, of Lympton, which is in the precinct of the port, took twenty shillings of a certain person, and would not permit the mayor and commonalty to receive the custom, and assaulted one John, a bailiff of the king, whom they had deputed to receive it. It appeared to be objected that the judgment for the plaintiffs was erroneous, because the suit ought not to have been brought in the exchequer; on the other hand, it was answered that the plaintiffs were the king's farmers, and that therefore it affected the crown, and the judgment seems to have been upheld (*Year-Book, Edw. II.*, fol. 280). It appears also from the *Memoranda in Scaccario*, temp. Edward I. (*Year-Book, Edw. II.*) that cases were brought into the exchequer chamber before the king and his barons of the exchequer by way of error, or complaint, or appeal (2 *Edw. I.*, fol. 3). The bounds of jurisdictions were not yet, however, exactly defined.

<sup>1</sup> *Vide ante*, 539.

<sup>2</sup> *Vide ante*, 539.

the parties. After these he mentions *curiam suam, et justitios suos, tam milites, quàm clericos, locum suum tenentes in Angliâ*, before whom, and before no others (except before himself, or his council, or special auditors), false judgments and errors of justices were reversed and corrected. Before them also were determined writs of appeal, and other writs in criminal matters; trespasses against the king's peace; and all writs which contained the clause *ubicunq; tunc fuerimus in Angliâ*. Next to these he ranks the *justitios residentes ad Scaccarium*, and those *in banco apud Westmonasterium* (a); after these, the justices assigned *ad gaolas deliberandas* in different counties; those assigned to take assizes, juries, inquisitions, certificates, and attaints; the justices itinerant *ad primas assisas, ad omnia placita, criminalia et civilia*; and the justices itinerant *ad placita de forestis*.

(a) To the Year-Book of Edward II. are appended "Memoranda in Scaccario de tempore regis Edwardi Primi," from which much valuable information may be collected as to the legal history of the age. From these it appears that the exchequer, though primarily a court of revenue, yet as the king and his principal barons, sitting there, received complaints as to the administration of justice generally, it had become a court of error. For we find an entry in the second year of a writ of error brought of a judgment given by justices (2 *Edw. I.*, fol. 3). And that it was the *curia regis*, for one of the records commences, "*Quia curia regis coram baronibus de scaccario*" (5 *Edw. I.*, fol. 6). But that it had no ordinary jurisdiction, save as to debts due to the crown, for in 5 Edward I. a record runs thus: "*Cum placita coram baronibus in scaccario secundum legem et consuetudinem regni sui teneri non debeant nisi de debitis regis propriis et ministrorum de scaccario, ac Johannes de Michelden qui non est minister regis implacitet coram Adam de Fraxino coram baronibus de £13, etc., rex, nolens sustinere hujusmodi placita, contra tenorem Magnæ Chartæ, de libertatibus Angliæ alibi quam suis locis propriis et debitis placitari; rex mandavit baronibus quod placitum illud vel aliud placitum commune coram eis non teneant,*" etc., (fol. 7). And again, in the 12 Edward I. we find this record: "*Cum placita de transgressionibus et catallis, et debitis, et alia communia placita coram Justiciariis de banco vel coram Justiciariis Itinerantibus, aut coram viscontibus in suis comitatibus debeant et consueverunt, secundum legem et consuetudinem regni placitari et terminari; et non ad scaccarium nisi tamen placitis de debitis regis, etc., et de debitis ministrorum regis ejusdem scaccarii ac de transgressionibus ejusdem ministris,*" etc. (12 *Edw. I.*, fol. 12). Thus, therefore, it was settled law that common suits ought not to come into the exchequer in the first instance. Numerous entries attest how entirely arbitrary the courts then were in all that regarded the crown, and how eagerly every case was taken advantage of for the purpose of securing some emolument to the royal treasury. Thus, for instance, we find that one Gilbert de Brunholmstead was adjudged to prison for a certain term for some trespass of which he was convicted before the justices itinerant, and he was convicted of felony, and after that demanded his privilege of clergy; but it was not allowed, except on infliction of a fine, "*Sed non fuit liver al ordinari postea fecit finem pro imprisonmento;*" and then there was a writ to deliver him to the ordinary, if he desired it, but his goods were not to be restored (fol. 28).



All these were the king's courts; to which might be added, others in the country, as the county, tourn, and hundred courts; those in the king's manors, and those in cities and boroughs.<sup>1</sup>

Of these courts, that before the steward is the only one which has not been mentioned in the early parts of this history; for which reason it may be proper to add some further account of this court than King's Bench. the short mention made thereof when we were speaking of the statute passed in this reign concerning it. The stewards, says Fleta, had cognizance of all injuries (by which are meant trespasses), and all criminal and personal actions, *per inventionem plegiorum de proseguendo*, and were to do ample justice to parties complaining, without allowing any essoin. Thus, when sufficient pledges were found and enrolled by the king's clerk, who had the keeping of the *rotulum placitorum aulae pro rege*, the marshal was commanded immediately to attach the person complained of, if he was to be found within the limits of the household; otherwise he was not attachable by the marshal. If the complaint was against any *familiaris regis*, he was first to be summoned, and if he did come at the appointed day, then there was an award, *quodd attachietur* till a further day; and if he did not come then, there was an award, *quodd corpus capiatur* (provided he had received the summons personally within the verge), and brought before the steward; and then, says Fleta, the marshal was to be his pledge; or, in other words, he was to be continued in the marshal's custody, according to the law and custom of the household; and the marshal was to be answerable to the party complainant, if he did not have the body forthcoming. When Fleta has stated this to be the method of proceeding against a *familiaris regis*, he adds, *quodd dictum est de serviente regis, dici poterit de COMITIBUS, in tantum quantum paritatem consequuntur*: so that the authority of the steward went beyond the king's servants, properly so called.

As this court followed the king wherever his household removed, and so far suspended all other jurisdictions; the method was, when the king was about to fix his residence at any place, for the steward, in the name of the chief justiciary, whose place he filled, to command the sheriff,

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<sup>1</sup> Fleta, 66.

*quodd venire facias coram nobis* on such a day, *ubicumq*; *dominus rex tunc fuerit in ballivâ tuâ*, all assizes of novel disseisin, mortauncestor, *ultimæ præsentationis*, great assizes; all juries, inquests, attaints, pleas of dower *unde nihil*, which were summoned before the justices *ad primas assisas*, all prisoners, and persons manucaptured or bailed; all attachments which belonged to the gaol-delivery; and all the freemen to compose juries. When the steward arrived at the destined place, he began to discharge the business of the county; beginning as the justices itinerant did, with the criminal matters. After he had despatched those,<sup>1</sup> he then proceeded to trespasses committed within the verge against the peace; then to the assizes and fines; and lastly, to debts and contracts, where the debtors had voluntarily bound themselves to the distress of the steward and marshal. Matters that could not be despatched by him while there, were to be adjourned, either into the bench, *ad primas assisas*, into the county, or otherwise, as it seemed most expedient. He might direct proceedings to outlawry, waging of the duel, and everything which belonged to the regular justices itinerant.

The contracting of obligations *ad districtionem senescalli et marescalli*, or one of them, was the means by which the jurisdiction of these officers might be greatly extended, as the plea of *extra virgatum* would not in such case avail; in these matters, and in all others, except pleas of freehold, the parties were heard without writ.<sup>2</sup> When a person was convicted of a debt before the steward, he was to be committed to the custody of the marshal, till he had satisfied the party for his debt, and the king for his amercement and fine: however, he might be replevied *ex potestate marescalli* for forty days, but no longer.<sup>3</sup>

So necessary and inseparable an appendage to the king's household was this court thought, that when the king was in France, in the fourteenth year of his reign, and a person was charged with a robbery committed in the household, it was allowed by the French king (after the point of jurisdiction had been contested between his court and that of the English king) that the steward should exercise his jurisdiction; and the offender was accordingly put upon his trial, was sentenced and hanged.

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<sup>1</sup> Fleta. 67.

<sup>2</sup> Ibid., 68.

<sup>3</sup> Ibid., 69.

It will be seen, in the subsequent part of this history, how the steward occasionally delegated his authority to the justices, *locum suum tenentes in Angliâ*, who thence assumed to themselves the power to hold plea of suits *by bill* against persons in the custody of the marshal.

The chancery is called by Fleta *an office*, though he had before spoken of a *court* held *in cancellariâ*. This office, says he, was intrusted to some discreet person, as a bishop, or other dignified ecclesiastic, together with the care of the great seal. The department of the chancery was carried on by the assistance of several subordinate officers, who are thus described by Fleta:<sup>1</sup> *cui associantur clerici honesti, et circumscripti, domino regi jurati, qui in legibus et consuetudinibus Anglicanis notitiam habeant pleniorẽ*; it was the business of these clerks to hear and examine the petitions and complaints of suitors, and give them a remedy by the king's writ, fitted to their case.<sup>2</sup> These *collaterales et socii* of the chancellor, as he calls them, were the superior officers there; and were called *præceptores*, on account of the direction they gave, after hearing a complaint, for making out remedial writs. These *masters* had become of greater consideration since the statute<sup>3</sup> had enlarged their power of making out writs *in consimili casu*. The inferior officers are described as *clericos legaliter expertos*. These likewise were acquainted with the forms of writs, and had a power to allow such as they approved, and reject those that were defective. They were to examine all writs as to the matter and style of them, before they were put to the seal; nor was any to be sealed that did not come through their hands. There were besides six *clerici prænotarii*, who, together with the former, were considered as *familiares* of the king, and were provided with board and clothing out of the profits of the seal, for their trouble of writing out writs. Besides these, there were other clerks,<sup>4</sup> who are styled *juvenes et pedites*, young persons of inferior condition, who for despatch of business, were, by the favor of the chancellor, permitted to be employed in making out the *brevia cursoria*. These were to be under the superior clerks, who were to be answerable for all their acts; for which purpose it was required, that the writer's name should be noted on every writ.<sup>5</sup>

<sup>1</sup> Fleta, 75.    <sup>2</sup> Ibid., 76.    <sup>3</sup> *Vide ante*, c. x.    <sup>4</sup> Fleta, 77.    <sup>5</sup> Ibid., 78.

This is the account given of the chancery, and other courts, by the author of *Fleta*. The same writer is somewhat minute in relating the proceedings in certain personal actions, particularly that of debt (*a*). We shall give from him, first, the method of commencing such an action of debt in the steward's court, and then add something concerning this action, when brought at common law.

To commence an action of debt in the steward's court, there needed no writ, as was said before, but only to show the debtor's obligation, and that part of it where he bound himself to the distress of the steward or marshal (*b*); then, after

An action of debt in the steward's court.

(*a*) It is to be observed that as the court of chancery was, in its origin, rather an *office* than a *court*, the writs issued out of it were, for the most part, returnable or triable in some *other* court. Thus, the *Mirror* says (c. iv., s. 2, 3): "That writs issued out of the chancery directed, some to judges of other courts, some to officers as sheriffs, etc., and that those writs which were *not* pleadable or returnable before the king were returnable in chancery; implying that those which *were* 'pleadable' were returnable 'before the king,' i. e., in the king's bench." So it would be, for instance, in *scire facias* when a judicial writ. Thus, in *scire facias* on a recognizance in the chancery, brought in the chancery, the defendant pleaded a release, and the plaintiff denied it, and so they were at issue, and the action and process were sent into the queen's bench to be tried; and there the plaintiff was nonsuit, and brought a new *scire facias* there and well, for the record was then there and not in chancery; and so note, *that the chancery shall try nothing by a jury, but the king's bench* (*Year-Book*, 24 *Edw. III.*, fol. 45).

(*b*) The court of the "marshal" had jurisdiction over personal injuries within twelve miles of the royal court or residence, wherever he might be, which was the jurisdiction exercised by the court of the king, before the king himself—the supposed origin of the jurisdiction of the court of king's bench in common suits between party and party, although, as that court had such jurisdiction before the Great Charter, and was then deprived of it only indirectly and conditionally by the clause enacting that common pleas should not follow the king's court, it would follow that, when the court ceased to follow the king, it recovered its jurisdiction, and the senseless forms and fictions devised under the pretence of *giving* the jurisdiction (like the similar forms and fictions resorted to under the like pretence in the exchequer) had their origin *really* in the desire to multiply forms and accumulate fees. The court of the king, however, retained a species of privileged jurisdiction, copiously explained by Lord Coke in his case of the "*Marshalsea*" (*Coke's Reports*), and thus described in the *Mirror*: "The king maketh his justices in divers degrees, and appointeth to them jurisdiction, and that in divers manners, sometimes in certain; generally, as it is of commissions of justices in eyre, and of the chief justice of pleas before the king (i. e., the king's bench), and of justices of the bench (i. e., the common pleas), to whom jurisdiction is given to hear and determine fines not determined, the grand assizes, the transactions of pleas (i. e., common pleas), and the barons of the exchequer have jurisdiction over receivers and the king's bailiffs, and of the rights of the crown. Sometimes jurisdiction is given to the justices of the bench by removing of pleas out of inferior courts. To the office of chief justices it belonged to redress and punish the tortuous judgments of other justices, and

security *de prosequendo* was taken of the creditor, the marshal was commanded to distrain the debtor by his chattels, till he had found pledges (provided he was taken within the bounds of the household) to appear the next law day before the steward to answer the creditor without any *essoin*, or other delay. If the debtor could be found, he was to be attached *per corpus* till he had obtained his liberty by giving pledges; if he had no pledges, he was to be detained till he answered the creditor, but he was not to be put in chains. Suppose he found pledges, and had a day given him at the end of fifty days, at which he failed to appear, his pledges were amerced, and he was taken, if he could be found within the jurisdiction of the household, and detained, as in the former case; he was not to be again enlarged on pledges till he answered to the suit. If the debtor had been distrained twice, thrice, or oftener, and he at length appeared; yet, before his cattle were delivered, he was to make fine for his contempts, unless he could prove *per legem* that he came as soon as he knew he was called upon to appear; and then, upon giving pledges to stand to the suit, debtors were allowed to have the disposal of their chattels distrained, and were immediately to put in their answer to the creditor.

This was the process against those who bound themselves voluntarily to the distress of the steward or marshal. But the method of proceeding with those who were *comites*, was more gentle. They were first summoned by the marshal; and if they disobeyed, then they were to be distrained; and the third process, if necessary, was an attachment. In the same manner did they proceed against the *familiares servientes* of the king, who were attendant upon him in his house. It was upon this privilege of the king's servants that the saying, then well known, was founded, *quodd servientes regis sunt pares comitibus*.<sup>1</sup>

When the debtor came in to answer, he might allege many things against the creditor by way of exception. He might ask, what he had to show for his debt; and if

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by writ to cause to come *before the king* (*i. e.*, the king's bench), the proceedings and records, and before such justices are all writs pleadable and returnable, and also it belongeth to their office to hear and determine all plaints of personal wrongs (*i. e.*, as the phrase always means in the *Mirror*, wrongs to the person) *within twelve miles of the king's house*" (*Mirror*, c. iv., s. 3).

<sup>1</sup> Fleta, 131.

he had nothing but his own declaration to prove it, the person attached had judgment, *quòd quietus recedat*. But if he produced his *secta*, the debtor was to defend himself *per legem* against the *secta*, the same when the plaintiff produced tallies,<sup>1</sup> unless he was a merchant; for it was permitted *de gratiâ principis*, says Fleta, in favor of merchants, to prove tallies that were denied, by two sworn witnesses at least, who, upon diligent examination, were found to agree upon the day, place, number, and other circumstances thereof.

If a writing was produced, and any default was found in the name or number, the defendant might say, he was not bound to answer such writing, because it was faulty. He might say, *quòd non est factum suum*. He might say, he had paid it, if he had anything to prove the payment. He might say, he was not bound to the distress of the steward or marshal; and if that was proved, the plaintiff could recover nothing, unless he could reply, that though he was not bound to the distress of the steward or marshal, this could not avail him, for he belonged to the king's household, was always in his service, and in such case he was obliged to answer to the suit; for as he would be entitled to an *essoìn de servitio regis* in every other court, there would be an entire stop to justice, if he could not be sued in this. He might say, he ought not to answer, because he was taken without the limits of the household, and not within the jurisdiction of the marshal, but brought there by violence. He might say, that the king did not reside within twelve miles of the place on the day named in the *narratio*, so that the fact could not happen within the limits of the household, and, of consequence, not within the cognizance of the steward. He might say, it concerned his freehold, and so might demand judgment, whether he was to answer concerning his freehold without a writ. He might say, that the plaintiff had complained of the same trespass in another court, where he *quietus recessit, et querens in misericordiâ pro falso clamore*. He might show an acquittance; or say, that another plea was then depending in another court by writ for the same matter. If there was a condi-

<sup>1</sup> A tally is thus defined by Spelman:—*TALLIUM, alias TALEA — est clavola vel ligni portiuncula, utring; complanata, cui summa, debiti insiditur: fissaq; inde in duas partes, una debitori, altera creditori traditur in rationis memoriam*. It seems a tally was a common security for money in those days.

tion in the obligation, he might say, that he was not bound to pay the debt, because the condition was not satisfied.<sup>1</sup>

If more than one were bound by the obligation, he might demand judgment, whether he was to answer singly for a debt contracted by many in common. Again, if each was bound to pay the whole, he might say, that one of them paid it for all, and he might vouch the record, or an acquittance of the plaintiff; but if he failed of the record or acquittance, at the day fixed for him to produce it, he was, for his delay, to render double damages to the plaintiff, and be grievously amerced in proportion. If he did not appear at all on the day appointed, his pledges were to be further distrained till they satisfied the creditor, or rendered to the marshal the body of the principal; and were likewise to be amerced for the failure of the record or acquittance. He might say, that at the time of making the obligation he was *non compos mentis*, or *non sui juris*, because under age, in the custody of such a one, in prison at such place, or oppressed, or coerced by threats: if a wife, she might say, she was not to answer without her husband. Many other exceptions, which would defeat the plaintiff's action, might be taken.

It should be observed, that when the obligor died, the obligation died with him, for no one could bind his heir to answer to the distress of the steward or marshal. Again, it must be remembered, that this whole jurisdiction of the steward in matters of debt, which was a *commune placitum*, was against the provision of *Magna Charta* on that point;<sup>2</sup> since which, says Fleta, common pleas were to be confined to the justices of the bench, and justices itinerant *ad omnia placita*. But, adds he, this cognizance of certain special causes was given to the steward by the king in analogy to the jurisdiction exercised by the exchequer over such common pleas as concerned the king, though equally within the chapter of *Magna Charta*: the latter was permitted in hopes that the king might obtain his own debts, through the debtors of his debtor, with more ease than by levying it on his own debtor's lands and chattels. However, it seems this privilege of suing in the exchequer was rarely extended beyond a person *in debito regis vehementur existentem*; and then it

<sup>1</sup> Fleta, 132.

<sup>2</sup> *Vide ante*, c. v.

was never done but by special permission from the king.<sup>1</sup>

Actions of debt were also brought in the county, in cities, boroughs, and franchises, in cases of small demands (a); and as in the former instance the interest of the king was consulted, in this latter it was for the benefit of the people at large, that they should have justice administered near their own homes without much trouble or expense. Debts under forty shillings were recoverable in the hundred, wapentake, trithing, and other inferior courts belonging to the king or to great lords.<sup>2</sup>

The writs of debt were various. One, since called *si* Common action of debt. *RECOGNOSCAT*,<sup>3</sup> was thus: *Rex vicecom. Præcipimus tibi quoddam A. RECOGNOSCAT se debere decem libras, tunc distringas præfatum A. ad prædictum debitum præfato B. sine dilatione reddendum, etc.* This gave the sheriff a record of the matter; and if the debtor acknowledged the debt before the sheriff, he was to be distrained by all his movables till the creditor was satisfied. If the debtor denied the debt, then the plaintiff had the following writ: *Præcipimus tibi, quoddam JUSTICIES A. quoddam justè, etc., reddat B. decem marcas quas ei debet, ut dicit, sicut rationabiliter monstrare poterit quoddam ei reddere debeat, ne amplius inde clamorem audiamus pro defectu justitiæ, etc.* This was a writ of

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(a) Debts or causes of action to any amount were cognizable in the county court by writ. The limitation of amount applied only to suits by mere plaint without a writ, which meant a fee. "En counties, par devant les viscontes, etc., poient estre pletes sans nos brefs, pletes de trespass et de dettes, issint que les biens emptes ne les trespass ne les dettes demaundes ne passent mye xls. ne de dettes passant mesme la somme sans nos brefs, les ques nous volons aucune foits que soient pletes en counties si il ne soient de illonques remues par nos commandements" (*Britton*, "De dette," fol. 62). So the *Mirror*, in its remarks on the clause in the statute of Gloucester as to suits above 40s. in the superior courts, notices that this distinction was lost sight of, and says, "For small trespasses, debts, contracts, and such things, not exceeding 40s., suitors have power to hear and determine without writs by ordinary jurisdiction, and by writs in other cases, for sheriffs have more jurisdiction in their writs viscontiel," etc. (c. v., s. 3). And at the end of the chapter it is added: "Et sont autres aciones personelles pletables par viscont par nos brefs de justices, de torts faits en contractes, come est de covenants ufeint, ou de accounte, ou de aver commune, ou de chartres detenus, et de nuisances," etc., (fol. 71). Thus, therefore, it is plain that even at this era in the history of our law, the county court had jurisdiction to any amount, provided a writ of justices was sued out, which only meant that a fee should be paid to the king's exchequer.

<sup>1</sup> See an instance of such permission in Ryley's *Placita Parliamentaria*.

<sup>2</sup> Ryley's *Pla. Parl.*

<sup>3</sup> O. N. B.



*justicies*, upon which it had been the practice of the sheriffs not to proceed till pledges *de prosequendo* were found. This, however, is blamed by Fleta, since the writ required no such process, but according to that author, they ought only to *command* the debtor, as they were directed by the writ. If he did not make payment forthwith, it was clear he meant to stand out a suit; and should the plaintiff pray that suit should be made to recover it, then, and not till then, need he offer pledges *de prosequendo*. Upon such security being given, the debtor was to be summoned by two freemen of the vicinage where he resided, to appear at the next county, to answer in the said plea of debt; and it was sufficient if the matter of such summons was related to any of his family. If he did not appear at the day, nor essoin himself, then, on the appearance of the plaintiff, the sheriff was commanded to distrain him till he found pledges to appear, and answer at the next county.<sup>1</sup>

If the debtor appeared, and the debt was proved, the judgment was, *quodd recuperet debitum cum damnis*, which latter were to be taxed by the sheriff and *sectatores* of the county, if the defendant prayed it; and the defendant was to be *in misericordiâ*: the bailiff of the hundred where the defendant had most movables was then commanded, *quodd de catallis suis habere faciat, etc.* Should the bailiff be remiss in this, and not properly execute the writ, or should the debtor, in order to defraud the creditor, have designedly suffered his land to lie unstocked, and no beasts or chattels were to be found thereon; in such case it was advisable for the creditor to remove the plea by *pone* to the superior court, and then execution might be had in any hundred or county; and of the land also, by an *elegit*, grounded on the late statute.<sup>2</sup>

But to save the trouble of such removal by *pone*, it would be better to commence the action originally before the justices of the bench, by the following writ: *Præcipe A. quodd justè, etc., reddat B. decem marcas quas ei debet et injustè detinet, ut dicit: et nisi fecerit, et præfatus B. fecerit te securum de clamore suo prosequendo, tunc summane per bonos summonitores præfatum A. quodd sit coram justitiariis nostris apud Westmonasterium tali die, ostensurus quare non fecerit,*

<sup>1</sup> Ryley's *Pla. Parl.*, 134.

<sup>2</sup> *Vide ante*, c. x.

*etc.* This writ differs very little from the writ of debt in Glanville's time.<sup>1</sup> There was another writ of debt now in use for executors: *Præcipe A. quodd justè, etc., reddat B., etc., executoribus testamenti talis, etc.*; and on the other hand, one against executors: *Præcipe A. et B. executoribus testamenti C. quodd justè, etc.* Respecting executors, it was held at this time, that if they demanded a sight of the instrument by which a debt was claimed against them, they could not afterwards plead, *quodd de bonis defuncti nullam habent administrationem*.<sup>2</sup>

Another writ cognizable in the county was one which has not yet been mentioned, and which was called *de annuo redditu*. This likewise might be pleaded in the county, and was as follows: *Præcipimus tibi, quodd justicies A. quodd justè, etc., reddat B. DECEM MARCAS, quæ ei à retrò sunt de annuo redditu tanti per annum, sicut rationabiliter, etc.* An *annuus redditus* might be due in three ways: either where a lord was seized of a certain rent, together with homage and fealty, issuing out of a freehold, or where the lord had assigned over the rent, which remained as a charge upon the freehold into whatsoever hands it passed; the third way was, when the rent was received not out of a freehold, but *de camerâ*, from a chamber, or the like, for the life of somebody. The writ of annuity went for the arrears and damages: to the damages the defendant might answer *per legem*; but to the arrears he could not. This writ would lie upon the mere writing containing the grant, without any seisin having been obtained.<sup>3</sup>

To return to the action of debt. If the sureties were distrained without proceeding against the principal debtor, who yet was able to pay, they might have a writ to the following effect, directed to the sheriff: *Monstraverunt nobis A. et B. quodd cum ipsi, etc.*, stating that they were sureties only, and were distrained, notwithstanding the principal debtor was sufficient, which ought not to be; therefore, *Tibi præcipimus, quodd distingas præd. C.*, the principal debtor, *pro præd. pecuniâ, et præd. plegiis pacem habere permittas; et averia sua si qua eâ occasione ceperis, sine dilatione deliberari facias, etc.* It has been before seen<sup>4</sup> what provisions had been made in case of sureties for debts due to the king. We now find, that if the sureties had paid

<sup>1</sup> Vide vol. i., c. iv.

<sup>2</sup> Fleta, 135.

<sup>3</sup> Ibid., 136.

<sup>4</sup> Vide vol. i., c. iv.

the debt of the principal, or had incurred any damage on account of it, they might have the following writ: *Præcipimus tibi, quòd justicies A. quòd justè, etc., acquietet B. de centum solidis unde posuit eum plegium versus C. et nondum eum acquietavit, ut dicit, sicut eum rationabiliter, monstrare poterit, quòd eum acquietare debeat, ne amplius, etc.*, which, like other justicies, might be removed into the superior court by *pone*. If the action was brought originally in the superior court, the writ was thus: *Præcipe A. quòd justè, etc., acquietet B. de centum solidis, unde, etc.* This writ, nearly in these words, was in use in Glanville's time;<sup>1</sup> but it should seem, it then lay for the creditor only against the surety; now it lay for the surety against the principal; as the surety, by paying the debt, had put himself in the place of the original creditor.

We have seen what was the method of proof in an action of debt in Glanville's time.<sup>2</sup> Nothing is said on this subject by Bracton (*a*); but from the practice, which obtained in many actions, of bringing a *secta*, and afterwards a jury, it is most probable the mode of trial in his time was the same as is stated by Fleta in this reign. That writer says, that if the creditor had no writing to

(a) There is a good deal upon the subject in Britton, which our author lost sight of. The chapter "De dette" is remarkably copious and complete. It first treats of the different kinds of debts: "Obligation doit estre vestere de V. maneres de garniment, de chose, de parole, de escript, de unite de volonte, de bail, de jointure. De chose, quant aucun chose est apprompt de rendre, etc. De parole, coraunto entre le creaunsour et le dettor, per les ques ils donassent per offres et per demandes. L'autre est escript: dont il est simple et sauns condition; et aussi purra l'escript estre conditionel, etc. L'autre est bail, etc. Et adonques les debtors se purrait eyder (aider) en moults des maners par exceptions. Et se il tende taille ou suyte, et la suyte soit trouve accordante, adonques purra il defendre la det par sa ley. Car il purra dedire l'escript, et tendre par pays que ces n'est mye son fait. Et si le pleyn-tife priè, soit donques enques la verite per les testmoynes nommes en l'escript ou per pays" (*i. e.*, by the attesting witnesses, or a jury); "ou il purra dire que l'escript ne luy doit grever, car quant il le fist il le fait dedens l'age de xx. ans, ou que riens ne fuit fait per son seal, et en tiel manere purra et dedire le fait; et sur ce soit enques la verite par la visne ou le fait duist estre fait, et solonque le verdit du pays soit celui que serra trouve mentour juge a la prison, et puny per fyn. Et celes exceptions, eyent lien en nostre court devant nos justices" (*Britton*, fol. 66). So of other defences, as acquittance, or condition, etc. Thus, therefore, it appears that the mode of pleading and proving defences was already settled. And it is added: "Et come aucune dette soit recouvre en nostre court, soit le judgment et la execution fait solonque la ordinance de nos statute" (fol. 70), meaning the enactment in the statute of Westminster as to exemption.

<sup>1</sup> *Vide* vol. i., c. iv.

<sup>2</sup> *Ibid.*

show, he was to take some other method of making out what he calls *rationabilem monstrationem* that a debt existed; for, continues he, it had been ordained by *Magna Charta* that no one should be put to answer either *per legem* or *per juramentum* upon the *simple voice* of another.<sup>1</sup> The creditor was therefore to produce a *secta*, that is, the testimony of certain lawful men who were present at the contract; and if these, upon being examined by the judge, were found to agree, then the defendant was to *vadiare legem*, as it was now called, or wage his law against the plaintiff and his *secta*. The mode in which this was done is thus described by Fleta: If the plaintiff produced two witnesses, the defendant was to produce four; if three, he was to produce six; so that the defendant was always to have two *juratos* to the plaintiff's one, till they came to twelve; and they did not ever go further than *duodecimam manum*. In this case, says he, the proof lay upon the person who denied the charge.<sup>2</sup> It was a rule, that where the right was equal, the defendant rather than the plaintiff should be admitted to the proof. The waging of law was considered as making a proof, and always surpassed the presumption raised by the *secta*, according to the rule, that *lex vincit sectam* (a). If any of the *jurors* (for so those who swore for the defendant were called) refused to swear, or

(a) In Britton the whole matter is very fully described under the title "Dette." The defendant, it is said, might take any exception, and, among others, that he had nothing of the plaintiff for which he was indebted. "Si il eyt rien de luy per quoy il se soit tenu a cet dette rendre;" and upon this he could have wager of law. "Et si il tende taille ou suit, et la suit soit trouve accordante, adonques purra, il defendre la det per sa ley," etc. (*Britton*, fol. 64). Or, again, he might deny a deed, and that would go to the country, *i. e.*, a jury. "Car il purra dedire l'escript, et tendre par pays, que ces n'est mye son fait." "Et en tele manere purra il dedire le fait, et sur ces soit enquis la verite par la visne, ou le fait duist estre fait, et solonque le verdit du pays, soit celuy que serra trouve mentour juge a la prison et puny per fyn." The reason for the distinction was, that to a deed there would be witnesses who could be called as jurors, for at this time it must be borne in mind that jurors were still witnesses, that is to say, they gave verdicts of their own knowledge. It followed that in matters to which there were no witnesses there could not be trial by jury. Hence, in cases of private debts, without deeds, the procedure by wager of law or compurgators, that is, the defendant's oath, denying the debt, supported by the oaths of his compurgators. This was the only possible substitute in our age, which had not yet attained to the system of trying cases by the verdict of a jury upon evidence of witnesses. The practice of wager of law was found to lead to abuses; hence a statute afterwards passed in the reign of Henry IV. to check it in cases of account, by means of an examination of the plaintiff and his attorney.

<sup>1</sup> *Vide ante*, c. v.

<sup>2</sup> Fleta, 136.

those produced were not sufficient, the defendant was convicted. If the *secta* varied in their account, the defendant was not put to wage his law against it, but had judgment, *quòd recedat sine die, et querens in misericordiâ*.

What is said of a *secta* to prove the verbal declaration of the plaintiff, held equally where a *secta* was produced to prove a tally; for if a tally was not supported by a *secta*, credit would be given to the single oath of the party denying it. But, says Fleta, it is otherwise in cities and fairs, and in causes between merchants, in favor of whom, as was shown before, it was granted *ex gratiâ principis*, that the proof should lie on the party affirming; they therefore might prove their tallies, if denied, *per testes et per patriam*. There was this remarkable custom among merchants, that where a tally was produced to support an action, and another was produced to prove that the first was discharged, which tally of discharge was denied, the person whose tally was denied was to prove it in this way: he was to go to nine churches, and upon the nine altars of them he was to swear that the plaintiff gave him the said tally as an acquittance of the debt contained therein, "So help me God and His holy Gospels;" after which the judgment was, *quòd recedat inde quietus in perpetuum*, and the plaintiff *in misericordiâ*.<sup>1</sup> It was because these methods of proof left too much room for debtors to avail themselves of their hardness in swearing that another method of recovering debts was contrived by the statute-merchant.

This is all that is said by Fleta on personal actions; so that what he has left on this subject is confined wholly to the action of debt, and that *de annuo redditu*: nor is Britton more explicit. For further information therefore on this subject, we must have recourse to other sources. In the *statutum Walliæ* we find mention of other personal writs, with the proceeding upon them, as prescribed for the use of the Principality. There can be no doubt but this detail was copied from the course of proceeding in the English courts, and is particularly worthy of attention on that account. We shall therefore extract from thence what is said on the action of *debt*, *covenant*, and *trespass*.

The writ of debt hitherto mentioned was for the re-

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<sup>1</sup> Fleta, 138.

covery of money owing; but in this statute we find a writ for the recovery of a chattel belonging to the plaintiff. The following is a writ of this kind: *Præcipe A. quodd justè sine dilatione reddat B. unum saccum lance pretii decem marcorum, quam ei injustè DETINET; et nisi Of detinue. fecerit, etc.* This writ was in after-times called *detinue*; being in effect nothing else than a writ of debt, which, when brought to recover a chattel, was in the *detinet*, instead of the *debet*.

The process to be pursued in a writ of debt in Wales was this: Upon pledges *de prosequendo* being found, the debtor was summoned to appear at a certain day, and if he failed, was summoned again. If he failed at the second summons, and did not essoin himself, the debt was adjudged to the plaintiff by default, with damages at the discretion of the justice, or by an inquest of the country, as the justice pleased, and the debtor to be *in misericordiâ*. If the debtor appeared, then the plaintiff was to set forth the ground of his action; and, to prove it, he was to produce his *secta*, or a charter of obligation, or a tally. If the defendant denied the debt, and his obligation was produced against him, the writing was to be verified *per testes nominatos in obligatione*, if they were alive, *simul cum patriâ*. If there were no witnesses, or they were dead, it was to be verified only *per patriam*, and, according to the verdict of the country, judgment was to be given. If the plaintiff had no obligation, but only produced a *secta* or *tally*, the defendant might defend himself either *per legem*, that he owed him nothing (that is, by his own oath and that of eleven swearing with him), or *per patriam*, as he pleased. Again, if the defendant said he had paid the debt, he was to show an acquittance; to which the plaintiff might answer, by denying, either *per legem* or *per patriam*, that he had received anything.

The writ *de conventionem*, or of *covenant*, was sometimes for recovery of movables, sometimes of immovables. No forms of this writ are mentioned by Bracton or Fleta; but in the *statutum Walliæ* we find the following: *Præcipe A. quodd justè et sine dilatione TENEAT B. CONVENTIONEM inter eos factam de uno messuagio, cum decem acris terræ, et quinq; acris bosci, cum pertinentiis in N. Et nisi fecerit, etc., tunc summoneas prædictum A. quodd sit, etc., ostensurus, etc.* These writs varied according to the na-

ture of the covenant, and might be returnable before the justices, or, by a clause of *justicies*, in the county.

The process in a writ of covenant was as follows: Upon pledges *de prosequendo* being found, the defendant was to be summoned once, and, if needful, a second time. If he did not come at the second summons, nor send an *essoïn*, the *petitio* of the plaintiff was to be heard, and the thing in question, if a tenement, was to be taken into the king's hands; if a chattel, the thing or its value; and another day was given to the parties. If within fifteen days he replevied the thing so taken, and came at the day appointed, he was received to answer and make his defence; but if he did not appear, the claim of the plaintiff was adjudged to him by default, together with damages taxed, as above mentioned in a writ of debt, and he was to be *in misericordiâ*.<sup>1</sup> If the defendant appeared, both parties came to allegations, and at length to an inquest of the country, by which the matter was determined. There is no mention of any *secta* in this action; though it is most probable there was one in this as in other actions.

A freehold was sometimes demanded in a writ of covenant; as when land was demised upon a certain firm or rent, with a condition, that should the firm not be paid, the person demising might enter and hold the land: in such case, should the rent be in arrear, and the demisor not able to make an entry, he might recover the land, together with damages, by a writ of covenant. Again, when an agreement was made between two persons, that one should infeoff the other of a freehold, and give him seisin by such a day; if afterwards he infeoffed a third person of that tenement, then a writ of covenant would lie against him, not to recover the land (which having passed by lawful feoffment could not go back), but money or damages for the breach of covenant. Thus we see, that, in some cases, land could be recovered in a writ of covenant; and in such case it was a real action: in others, only damages; and then it was a personal one. In after-times, the former writ of covenant was that on which fines were generally levied.

We have seen a provision made in this reign<sup>1</sup> to confine actions of *trespass*, where the damages were not more than forty shillings, to the inferior courts;

Of trespass.

<sup>1</sup> *Vide ante*, 439.

and another<sup>1</sup> for shortening the process of attachment. Of this action we have been enabled to say very little: neither Bracton, Fleta, nor Britton give any particular account of the nature of the proceeding therein, after the parties were in court; nor do they even exhibit the form of the writ. In the *statutum Walliæ* it is directed, that the justice should command the sheriff, *quodd faciat venire* the person complained of, at an early day. The plaintiff was to set forth his complaint, as in other actions, and the defendant to make his answers thereto. As it could scarcely happen, says the statute, but the defendant would defend himself *per patriam*, the justice was to inquire the truth by a good and sufficient *patria*, by consent of the party: if the defendant was found guilty, he was to punish him by imprisonment, or fine, or *misericiordiâ*, and also by damages, which were to be given to the party injured, according to the nature of the trespass (a). This inquisition was to be taken, as we said, by consent of the parties; for if the plaintiff offered to verify the trespass *per patriam*, and the defendant refused the country, he was taken *pro convicto*, and suffered the same penalty as if he had been convicted by the country.

Though the writers of this period say so little upon the action of trespass, it happens that a complete record of the proceedings in trespass, from the writ to the award of a *venire*, is to be seen in Ryley's Collection. As this will furnish a specimen of records in other actions, as well as

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(a) This was one of those injuries which, being committed with force, was deemed to warrant a fine to the king, and to suggest either indictment or action: a doctrine now confined to actual force and violence, as a forcible entry or assault. The *Mirror* says of such cases: "Si ascun querevit vengeance adonque appuert de attaquer sa action par appelle de felonye, et si ils quent denends, des dammages, donque apprest de attainer se action par bref" (c. ii., s. 3). If, indeed, it is really criminal, as a felony, the right of action gives way to the king's suit: "Si autem duo vel plures competunt actiones, contra unum, quarum unum, sit criminales, et altera civiles, criminales prius debet terminari" (*Bracton*, lib. iii., fol. 113). But this only applies when the matter is really criminal, not where it is merely a ground of fine. Thus, in Year-Book, 16 Edw. II., fol. 490, is the case of the Prior of Coventry, who brought a writ of trespass against John de Nevill and many others, for a confederacy and riotous assembly, to beat him and his servants; and it was objected that the thing was an offence against the crown, so that the action pertained only to him; but Herle, J., said that the plaintiff only mentioned the riot as matter to aggravate the fine to the king, and that he relied on the trespass to himself, and for that he should recover damages; and though the king could pardon the fine, he could not the damages.

<sup>1</sup> *Vide ante*, 410.



in trespass, the reader will not think it tedious to read it at length. This record was in the 21st year of the king. It begins with a recital of the execution of the writ of attachment. *A. B. et C. attachiati fuerunt ad respondendum D. personæ ecclesiæ de Cheping-norton de placito, quare, vi et armis, in præfatum D. in suâ domo inventum insultum fecerunt, et ipsum a domo sua extraxerunt, et bona et catalla sua ibidem inventa ad valentiam centum librarum ceperunt, et asportaverunt, consumpserunt, et voluntatem suam inde fecerunt, et alia enormia ei intulerunt, ad grave damnum ipsius D. et contra pacem, etc.* After this, there followed a similar entry of the narratio upon the writ, in these words: *Et unde queritur, quodd prædictus A. et alii die sabbati proximâ post festum St. Johannis Bapt. hoc anno, vi et armis, venerunt ad domum ipsius D. apud Cheping-norton, et in præfatum D. in eâdem domo inventum insultum fecerunt, et ipsum a domo suâ extraxerunt, et bona et catalla sua ibidem inventa, viz. blada, frumentum, hordeum, avenam, cicerem, et quandam cistam in camerâ suâ ibidem inventam fregerunt, in quâ fuerunt diversa jocalia, ut cippi aurei et argentei, firmacula et annuli de auro et argento, et alia diversa scripta obligatoria de debitis quaterviginti marcarum et plus, sibi per diversos debitores debitis, et bona illa, et scripta, et alia bona ad valentiam centum librarum ceperunt, et asportaverunt, consumpserunt, et voluntatem suam inde fecerunt, viz. vina biberunt, cicerem, blada sua cum equis, et hominibus suis consumpserunt, et alia enormia ei intulerunt, ad damnum ipsius D. quingentarum marcarum, et contra pacem, etc. Et inde producit sectam, etc.*

Then the plea begun as follows: *Et prædicti A. et alii per attornatum ipsorum B. et C. veniunt, et defendunt vim, et injuriam, et quicquid est contra pacem, etc. Et idem A. pro se et aliis dicit, quodd ipse est persona ecclesiæ de Cheping-norton, et fuit prædictis die et anno; et eodem die accessit ipse ad ecclesiam suam prædictam, et ad domos suas eidem ecclesiæ annexas et pertinentes, de quibus domibus omnes prædecessores sui, personæ prædictæ ecclesiæ, fuerunt seisisiti tanquam pertinentibus ecclesiæ suæ prædictæ, ut de jure ejusdem; et sic ipse A. et alii prædictis die et anno ad domos ipsius A. venerunt, de quibus domibus ipsemet jam multo tempore præterito extitit in seisinâ. Sed tam idem A. quàm alii bene defendunt, quodd ad domum prædicti D. prædictis die et anno, vi et armis, non venerunt, nec in ipsum D. insultum fecerunt, nec ipsum domo suâ extraxerunt, nec aliqua bona sua ceperunt, asportaverunt, aut*

*consumpserunt, sicut eis imponunt; et de hoc ponunt se super patriam.*

To this the plaintiff replied as follows: *Et prædictus D. bene cognoscit, quodd prædictæ domus sunt pertinentes ecclesiæ prædictæ; sed dicit, quodd ipse jam undecim annis elapsis extitit persona præfatae ecclesiæ, et in plenariâ possessione ejusdem, et pacificâ; et hoc notorium et publicum est per totum comitatum Oxoniæ; et fuit in pacificâ possessione ejusdem prædictis die et anno quando prædictus A., etc., vie et armis, ut prædictum est, in ipsum D. in domibus suis propriis insultum fecerunt, et ipsum de domo suâ extraxerunt, et alia enormia, etc., ut prædicitur, ei intulerunt, contra pacem, etc. Et quodd ita sit, petit quodd inquiratur per patriam, et prædictus A. et alii similiter.* Then follows the award of a *venire*: *Ideò præceptum est vicecomiti, quodd venire faciat coram domino rege in octabis St. Mich. ubicunque tunc fuerit in Angliâ, etc., 24 tam miles, etc., per quos, etc. Et qui nec, etc., ad recognoscendum in formâ prædictâ, quia tam, etc.*<sup>1</sup>

It appears from hence that the *narratio* had become of more consideration than in the reign of Henry III. It was now drawn with more form and precision, and was liable to be excepted to if deficient in either. We find in the last reign<sup>2</sup> the order in which a defendant was to state his exceptions was this: first to the jurisdiction of the court; then to the person of the plaintiff; next, to that of the defendant; if they were both proper parties to the suit, then he might except to the writ. The writ, as it contained the ground of the action, and was the only part of the proceedings in writing (the *narratio* and the rest being all alleged *vivâ voce* at the bar of the court), was the most formal part of the proceeding, and that by which principally the defendant was to shape his defence. The only nicety almost in pleading was what arose upon the writ, which was examined, both in its form and substance, with much curious criticism. The *narratio* at that time was subject to no exception; but we find, in the time of Fleta, that exceptions to the *narratio* were pleas of course, and followed next after those to the writ. As the writ was a brief state of the demand, it was required of the plaintiff to spread out his case more fully in his *narratio*, pursuing still the style and words of the writ, for a dif-

<sup>1</sup> Ryley's *Plac. Parl.*, 1, 2, 5.

<sup>2</sup> *Vide ante.*

ference between them was a good cause of exception. The next plea after that to the *narratio* was to the action of the writ; and lastly came pleas in bar of the action.<sup>1</sup>

The method in which the pleading in an action was conducted seems to have been this: When the cause came on in court, first the writ was read; next the advocate for the plaintiff stated his case more fully, which was called *narrare*, or *to count*; from whence such statement was called the *narratio*, or *count*; then the advocate for the defendant put in his *exception*, or plea; and so they went on to reply, rejoin, take issue, or demur, as it seemed advisable. All this was transacted *vivâ voce* by the advocates on both sides; and the prothonotary (or themselves) minuted it down. If the advocates were overruled by the court, or wished to retract or amend, they were at liberty so to do, and it was accordingly done *instantanter*. The whole seemed to be managed very much in the way of the scholastic disputations, so fashionable in those days. When pleading was practised in this manner, it had more the appearance of argument than of form.

There was some little variation in the manner of dealing with jurors in civil causes. The method of effecting a unanimity among jurors, by affording the assize, as mentioned by Glanville and Bracton,<sup>2</sup> was now in some measure altered. Fleta lays it down for law that, when there was a difference of opinion among the jurors, it was at the election of the judge either to afforce the assize, by adding others till twelve were found who were unanimous, or to *compel* the assize to agree among themselves, by directing the sheriff to keep them without meat or drink till they all agreed in their verdict.<sup>3</sup> Another method was to enter the verdict of the major and lesser part of the jurors, and then judgment was given *ex dicto majoris partis juratorum*.<sup>4</sup> Jurors might, in civil cases, give a verdict upon their belief, which two latter modes were also used in the last reign.

The criminal law continued through this reign much in the state in which we left it in the former. However, the definition of some crimes was a little altered; and there seems to have been a variation in the method of trying persons who had been indicted.

<sup>1</sup> Flet., 116, 117, 118.

<sup>2</sup> Vide vol. i., 400; ante, 126.

<sup>3</sup> Fleta, 230.

<sup>4</sup> Vide 2 Hal. P. C., 297.

It has been before surmised that the provision about *peine forte et dure* was intended to effect a change in the method of proceeding by presentment, so that offenders, when indicted, should not be permitted to make purgations, but should be obliged to put themselves on an inquest.<sup>1</sup> This seems to be corroborated by Britton in more than one passage, where he treats of presentments. In speaking of those indicted by *presentment* he says, if they *ne se voillent acquitter*, will not put themselves upon their acquittal, they shall be put to their penance till they pray to do it.<sup>2</sup> As the other words of the statute before alluded to are here used, it cannot be doubted but the *acquittal* spoken of must mean the inquest directed by the statute. Afterwards, speaking of a defendant putting himself upon the country, he says, when the jurors came into court they might be challenged; and he states one cause of challenge to a juror, that he was one of those who *indicted* him; and there was a presumption that all who indicted him still bore the same ill-will against him.<sup>3</sup> It is also said by Britton, that a person indicted should have fifteen days for his defence,<sup>4</sup> which adds to the probability that the inquest he was to be put upon for his acquittal was not the same which presented the offence.

The manner in which this second inquest was ordered is thus described by the same author: When the jurors came into court, the challenges were to be made, the principal of which was that above mentioned; and if the prisoner could not or would not challenge them, as there was a sufficient number of jurors unchallenged, that is, to the number of twelve, then they were to go to the book. If there was not sufficient, then the challenges were to be tried; and if they were found true, so that there was not a full *dozen*, another day was to be appointed, and the sheriff was to summon more. When the oath was put, they were to swear, one after another, that they would speak the truth of what should be demanded of them on the part of the king; but there was to be no mention of their *belief* in cases of life and limb, it being required that in matters of so high concern they should speak upon their knowledge only. After this, the justices were to give a charge to the jurors upon the matter concerning

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<sup>1</sup> *Vide ante*, c. ix.<sup>2</sup> Britton, 11.<sup>3</sup> Britton, 12.<sup>4</sup> *Ibid.*, 10 b.

which they were to speak the truth. They were then all to go and confer together, and be kept by bailiffs, so that no one should be suffered to go near them; and if any one did, or there was any one of them who was not sworn, he was to be sent to prison, and all the others amerced, as a punishment for merely suffering it. If they should not agree, they were to be separated and interrogated why they could not; and, after all, according to the sense in which Britton is interpreted by a late editor, the opinion of a greater number was to be followed,<sup>1</sup> though no other author speaks of a verdict being taken in a *criminal* case without the concurrence of all the jurors; and such unanimity is expressly required by Fleta.<sup>2</sup> If they all declared upon their oaths that they knew nothing of the facts, others were to be put in their place who did know it; and if he who put himself on the first inquest would not put himself on the new jury, he was, according to our author, to be remanded to penance till he did.

Further, if the prisoner, finding the verdict was likely to pass against him, would say that some of the jurors were about to procure his condemnation, at the instigation of the lord of whom he held his land, to obtain an escheat, or from any other motives; then the justices were carefully to question them, and make strict examination and inquiry how they were satisfied of their verdict. They perhaps might say one of their fellow-jurors told it them; and he (proceeds our author) perhaps might say that he heard it asserted for a truth at a tavern, or some other place, by one of the rabble, or such a one as nobody ought to give credit to. If it appeared to the justices that one of the jurors was influenced, or was entreated or procured by the lord, or by the enemies of the indicted, to get him condemned, they were to cause the procurers to be taken and punished by imprisonment and fine. Britton lays it down as a rule, that should the jurors be doubtful of the matter, and nothing certain could be made out, they should in such cases always find for the defendant.<sup>3</sup>

It appears very evidently from this account of the inquest upon which a prisoner put himself to establish his

<sup>1</sup> See Kelham's translation of that part of Britton which relates to the pleas of the crown, p. 42.

<sup>2</sup> Fleta, 52.

<sup>3</sup> Kelham's Britton, from p. 34 to 45.

innocence, that the jurors were considered as *witnesses*, the same as in other juries, and in assizes; and to call witnesses before them would have been absurd, and not at all consonant with the notion entertained of this proceeding. They were *sworn to speak the truth*, to discharge which duty they must speak from their own knowledge, and not from the testimony of others; and as they came from the vicinage where the fact was committed, none, it was thought, could be better able to perform the office than themselves.

It was many years after this reign, and when the second (since called the *petty*) jury began to be considered rather as judges of the presumption raised by the finding of the presentors than as witnesses of the fact, that a kind of evidence used to be exhibited to them. The first evidence made use of in this way consisted of written papers, such as depositions, informations, and examinations taken out of court: this led by degrees to a sparing use of *vivâ voce* testimony. It was long before they thought it necessary to bring evidence into court in support of the prosecution, and it was still longer before they allowed the prisoner to disprove the indictment by anything else than the oaths of the twelve *jurati*. When a prisoner was permitted to call witnesses to prove such matter as he offered in his defence, it was a high favor, and depended much on the discretion of the court, and the manner in which the charge had been made out by the prosecutors; besides this, the witnesses for the prisoner were never upon oath, which always left a pretence for discrediting their testimony.

The trial by jury at the time of which we are now writing was, to all intents and purposes, a trial by witnesses, and no doubt deserved all the value that was set on it by our ancestors. When the condition of society so changed, that notwithstanding all the supposition of their personal knowledge of the fact, as coming from the vicinage, they were in reality wholly ignorant of it; and it was necessary the charge should be *proved* to them before they could pronounce on the guilt or innocence of the party; then the old proceeding became a piece of mummery, productive of oppression and tyranny, till at length it was softened by the calling of witnesses to inform the conscience of the twelve jurors. This was the last improvement of the trial by jury in criminal cases, and was

not thoroughly effected till the times of Edward VI. and Queen Mary.

The inclination in favor of juries had gone so far in this reign that there seemed a backwardness to allow the trial by duel, where a defendant insisted upon it as his right, which could only be in an appeal. Should there be any slip in the proceedings, of which the defendant had omitted to avail himself, the judge was *ex officio* to examine and point it out, in order to stop the duel. Fleta says that this was a trial not to be resorted to rashly,<sup>1</sup> if by any possible means it could be avoided.<sup>2</sup> Another alteration in our criminal proceedings was that the eyre was no longer to be a time of limitation for the prosecution of offenders; but they might be prosecuted at any distance of time.<sup>3</sup>

It has before been shown what was ordained by statute concerning the exemption of the clergy from criminal jurisdiction.<sup>4</sup> The practice in Britton's time, respecting clerks is thus stated by that author (a). If a clerk accused of

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(a) It appears plainly, by the testimony of contemporary authors, and of Lord Coke himself, that the law was deliberately warped and altered in this manner by the servile judges of the king, with a view to his emolument and advantage. That is, as to privilege of clergy. As to what the law was when the statute passed there could be no doubt, because, as Lord Coke says, it had just been laid down by Bracton, and is admitted and recited in the statute itself, viz., that a clerk arrested or accused of a crime could be claimed by the ordinary, "*Cum vero clericus captus fuerit pro morte hominis vel alio crimine, et imprisonatus, et de eo petatur curia Christianitatis ab ordinario loci*," etc.; "*imprisonatus ille statim ei deliberetur sine aliqua inquisitione faciendi*" (*Bracton*, lib. iii., fol. 123). Then the statute recited the privilege, and simply admonished the prelates not to deliver or liberate those thus delivered to them, without putting them to their canonical purgation, so that the king should not be put to other remedy, "*Que ceux que sont endites, etc., en nul manner ne les delivrent sans due purgation, issint que le roy neit mestier de mitter auter remedy*" (*Stat. Westm.* 1, c. 2). Upon which the king's lawyers actually held that this gave them power to try the clerk *before* he was delivered to the ordinary! the plain meaning of the statute being just the reverse; for if they were to be tried by the common law, why should they be put to their canonical purgation? Yet Britton, writing after this statute, and avowedly writing at the dictation of the king (his treatise indeed beginning in the name of the king, who himself is supposed to be writing), says, "*Si clerk encoupe de felony (i. e., endite) allege clergie, et est tiel trouve (i. e., que est un clerk) and l'ordinary demaund donques serra inquis coment il est mescrue (i. e., culpable) et s'il soit nient mescrue, donques il serra aroge tous quits; et s'il soit mescrue, si soient ses chateaux taxes, et ses terres prises in nostre maine; et son corps deliver al ordinary*" (*Britton*, c. iv., fol. 11). That is, as Coke puts it, "and thereupon an inquisition was taken whether he were guilty of the fact or not; and if he were found

<sup>1</sup> *Cum levitate.* <sup>2</sup> Flet., 51. <sup>3</sup> Wingate's Britt., p. 12. <sup>4</sup> *Vide ante*, c. ix.

felony pleaded his clergy, and was found to be a clerk, and was demanded by the ordinary, it was then to be inquired whether he was guilty; and if he was found not guilty, he was to have judgment of acquittal; if guilty, his chattels were to be appraised, his lands seized into the hands of the king, and his body delivered to the ordinary; and if the ordinary delivered him out of prison before he was acquitted according to the due order of canonical purgation, or if he kept him so negligently as to let him escape, or maliciously kept him in such manner as to prevent his coming to make his purgation; in either of these cases the ordinary, if convicted of such misbehavior, was to be *in misericordiâ*. Upon the ordinary certifying that a clerk so delivered to him was acquitted by purgation, restitution was to be made of his goods, provided he had not fled. Further, if the ordinary, either in person or by his procurator, demanded one who was a layman or *bigamus*, or not of a condition to be entitled to clergy, he was to be punished by imprisonment, as was also a procurator who in any case presented himself as such without any authority in writing from the ordinary.<sup>1</sup>

There are some variations between the description of offences given by Britton and his contemporary Fleta. Fleta speaks of treason almost in the words of Bracton;<sup>2</sup> but Britton says treason is every mischief which a man knowingly does, or procures to be done, to one to whom he is in duty bound to be a friend. Treasons he divides into *grand* and *petit*, though he does not specify what were to be ranked as the one or the other. Some of these treasons were punished by judgment of death; some by loss of limb, pillory, or imprisonment; and others by a slighter penalty, as the case required. *Grand* or *high treason* was to *compass* the king's death, or to disinherit him of his realm, or to falsify his seal, or to counterfeit or clip his coin. A person might also, says our author, commit high treason against others several ways; as a villein procuring the death of his lord, who was seized

guilty, his goods and chattels were forfeit, and his lands seized into the hands of the king," which explains the reason of the king's anxiety to have the parties tried, and the readiness of the crown lawyers to warp the law for the purpose. That they did so is manifest; for there is not a word in the statute as to trial by the county, and the tenor of the enactment implies the contrary.

<sup>1</sup> Wingate's Britton, p. 11.

<sup>2</sup> Flet., 31. *Vide ante*.



of him; and those who drew persons into such perils as to lose life and member, or chattels.<sup>1</sup>

It seems, from this account of it, that the crime of treason was very vague and undefined, so that almost any enormity might, by construction, be brought within the penalty of it. The same author goes on and says that the judgment in high treason was to be drawn, and suffer death for the felony; and, says he, the same judgment ought to be given against those who, in appeals of felony, were attainted of counterfeiting, or otherwise falsifying the seal of their lord of whose dependence or homage they were; or of committing adultery with the wives of their lords; of deflowering the daughters of their lords, or the nurses of their children. A woman attainted of any treason was to be burnt. Those attainted of falsifying the seal, if the fact was of small consequence, were to have judgment of pillory only, or to lose an ear; but if the fact was of an enormous or heinous nature, as if it produced disherison, or any lasting damage, the offender was to have judgment of death.<sup>2</sup>

Arson was, when any in time of peace feloniously burnt other's corn or houses; such offenders were to be burnt, that they might suffer in the same manner in which they had offended. The same punishment of burning was to be inflicted on sorcerers, sodomites, and heretics.<sup>3</sup>

The crime of *hamsoken* is barely mentioned by Bracton, without any description of it. Offenders of this kind are called by Britton *burgessours*, since called *burglars*, and are described to be such as feloniously, in time of peace, break churches, or the mansion-houses of others, or the walls or gates of cities or boroughs, except they are infants under the age of discretion, and poor people, who through hunger enter the house of another for food, and take under the value of twelve pence; excepting also idiots, madmen, and others, whom the law would not consider as capable of committing felony. *Burgessours* were to be punished with death.<sup>4</sup>

The stat. Westm. 1,<sup>5</sup> seems to consider the stealing of twelve pence as a petty larceny. The statute *articuli super Chartas* seems to require the taking to be more than twelve

<sup>1</sup> Wingate's Britt., p. 16.

<sup>2</sup> Fleta, 16 b.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid., 17.

<sup>5</sup> Vide ante, c. ix.

pence.<sup>1</sup> Fleta says, if a person steals the value of twelve pence, *et ultra*, it shall be death ;<sup>2</sup> Britton says, if it is twelve pence or more ;<sup>3</sup> though in another passage he says that death would follow if the value was under twelve pence. So that it seemed to be not quite settled whether the sum was twelve pence or more that induced the penalty of death. The latter author makes no distinction between robbers and thieves as to this point. If any persons, says he, were indicted by presentment of *robbery* or *larceny*, or of cutting purses, of receiving felons, of enchantment, as pretending to charm people, of cheating, by selling bad things for good, as pewter for silver, of brass for gold, or were guilty of the like small offences, they were to be apprehended ; if they could not be found, they were to be outlawed ; and if judgment was passed against them, they were to be hanged, or to lose an ear, or to be pilloried, in proportion to their crime and the frequency of committing it,<sup>4</sup> so discretionary and various were punishments at this time.

Again, in petty larcenies, says our author, as for stealing sheaves of corn in August, or pigeons or poultry, if the offender was not suspected of any other crime, and the thing stolen was under the value of twelve pence, he was to be put in the pillory for an hour, and to be disabled from taking the oath of a juror or being a witness. If they were persons of bad character, or offended out of mere malice, and not through want<sup>5</sup> (which was an extenuation, if not even a justification, adopted from the canon law),<sup>6</sup> then they were to lose an ear, and become infamous. For a second offence it was to be in the discretion of the justices either to sentence them to death, or to order their other ear to be cut off ; and for the third offence, whether the crime was great or small, they were to suffer death.

Cut-purses were, for the first offence, to be sentenced to the pillory. If they had stolen other things, under the value of twelve pence, then they were to lose their ears ; if the value was more than twelve pence, they were to be hanged.<sup>7</sup>

<sup>1</sup> *Vide ante*, 537.

<sup>2</sup> Fleta, 55.

<sup>3</sup> Britton, 22.

<sup>4</sup> *Ibid.*, 23 b.

<sup>5</sup> *Ibid.*, 24.

<sup>6</sup> *Corv. Jus. Can.*, lib. iv., tit. 23.

<sup>7</sup> Wingate's Britton, p. 24.

The crime of homicide was at this time extended to persons who seemed to act in authority, and void of all guilt. Felony, says Britton, may be committed under color of judgment, as through malice of a judge; or under other color, as by an unskilful physician or bad surgeon; by poison, and sundry other ways. It might likewise be committed by those who, whether for hire or otherwise, had condemned, or caused any one to be condemned, to death, by taking a false oath; so that perjury, if it had the effect of procuring a judgment of death, was punished with death.

Among the additions made to our body of national canon law, we find in this reign the constitutions of the archbishops Peckham and Winchelsey. These were confined to subjects purely of a clerical nature, without touching upon those points of controversy that had so long inflamed the temporal and spiritual jurisdictions against each other.

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The character of Edward is that of a brave and wise prince, qualities which well fitted him for the undertaking to improve our laws, and maintain the execution of them with vigor(a). The king

King and  
government.

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(a) As already has been seen, the attention paid by this monarch to the administration of justice between subject and subject was the result of his perception of its advantage to himself, by reason of the additions it produced to the revenue; and he was infinitely less attentive to it as between himself and his subjects. Nevertheless, as the power of the commons was very much augmented in this reign, and parliament had begun to acquire a real and potential existence, he was obliged to recognize the claims of subjects for redress against the crown or its officers for extortion or oppression; and in this and the subsequent reigns the remedy by petition of right appears to have become very commonly resorted to, though too often without any results. A petition of right lay against the crown for any tort or wrong done by the king's officers for the king's profit, as for disturbance of a party in the taking of his tithe (the case of the Prior of Christchurch, 31 *Edw. I.*, 1 *Rot. Parl.*, 59; *Ryley's Plac. Parl.*, 218); or for tithes subtracted by the king's officers (8 *Edw. II.*, 1 *Rot. Parl.*, 319); or for wrongful distress (John Mowbray's case, 33 *Edw. I.*, 1 *Rot. Parl.*, 163; *Ryley*, 218). So for wool wrongfully taken for the king's use (Michael de Harla's case, 33 *Edw. I.*, 1 *Rot. Parl.*, 163; *Ryley*, 248). So for wheat seized under pretence of a royal commission (14 *Edw. II.*, 1 *Rot. Parl.*, 320). So for trespass to land (18 *Edw. II.*, 1 *Rot. Parl.*, 416); Westmilne's case, for bread and meat supplied to the late king (6 *Edw. I.*, 1 *Rot. Parl.*, 1); Everley's case, for an annuity granted by Henry III. (33 *Edw. I.*, 1 *Rot. Parl.*, 164; 1 *Ryley*, 25); Ayneshaw's case, for work

took a personal interest in reforming our legal polity, deeming the due and strict administration of justice the best defence against the turbulence of the great barons. By affording protection to his inferior subjects, he at once diminished the power of the great, and reduced the whole nation under the dominion of law.

It was in this spirit that he erected the court of *Trailbaston*.<sup>1</sup> This was a commission of oyer and terminer of an unusual kind, and was issued in the fulness of zeal for the correction of public disorders. The rigor, however, with which this was executed creating some discontents, it was thought expedient, in course of time, to discontinue it.

The heavy penalties inflicted on the judges for mal-

done as a mason (33 *Edw. I.*, 1 *Rot. Parl.*, 165; *Ryley*, 251); Basing's case, for wax (35 *Edw. I.*; *Ryley*, 334); Fitzwalter's case, for services in Gascony (33 *Edw. I.*, 1 *Rot. Parl.*, 169; *Ryley*, 259); Besney's case, for the price of a horse (33 *Edw. I.*, 1 *Rot. Parl.*, 164); Lodelow's case, for money paid for the king (33 *Edw. I.*, 1 *Rot. Parl.*, 169); the abbeſs of Fontevrault's case, for annuity (18 *Edw. I.*; 1 *Ryley*, 82); Bessop's case, for oats (14 *Edw. II.*; *Ryley*, 408), and many others. In the last case, Robert de Clifton brought a petition of right in parliament for injury done to his meadows by the king's keepers of Nottingham Castle, in digging a trench through his land for the supply of water to the king's mill. A commission *ad inquirendum* was issued, upon which the facts were found as stated in the petition; but he found himself as far from a remedy as before, and presented a petition of *grace* (as distinguished from one of *right*), praying some office as a compensation. A similar petition was afterwards presented by his son. Formerly petitions were often presented in cases where the proper remedy was by action. In such cases the course was not to reject the petition, but to endorse it with a direction that the "suppliant" was to pursue his remedy before the ordinary tribunals. Thus, a petition was presented by John Offerwest, for lands seized by the king's escheator, without saying "to the king's use," which was answered, "For the land mentioned in the petition, but in the king's hands, let certain persons be assigned to inquire whether the petition is true or not; and the inquisition being returned into chancery, let right be done" (4 *Edw. III.*, 2 *Rot. Parl.*, 376). And see instances of petitions of right for recovery of pecuniary demands for redress for injury done by the officers of Edward II. (22 *Edw. III.*, fol. 5). So in the case of torts or injuries by the king's tenants, permission to sue the wrong-doers to judgment and execution was granted upon the petition of right (De Grey's case, 15 *Edw. II.*, 1 *Rot. Parl.*, 396). So parties who had been compelled to pay to the crown debts already paid, or from which they were exempt, were to recover the amount by petition (5 *Edw. II.*, 1 *Rot. Parl.*, 284). The general result of the cases was, that where the subject was entitled to a right which the crown withheld, or suffered anything which the crown ought to redress, the remedy, either at common law or by Magna Charta, was by petition of right (1 *Rot. Parl.*, 421).

<sup>1</sup> Namely, by the statute of Ragman, *de justiciariis assignatis*, among the *statuta incerti temporis*.

practices are instances of the concern this king took in the execution of the laws. At one time, all the judges except two were convicted of corruption, and fines were set upon them amounting in the whole to the immense sum of 100,000 marks. It is related, that the offence of one of them, the famous Ralph de Hengham, was altering a record of a fine on a poor man from 13s. 4d. to 6s. 8d. This unreasonable act of humanity was punished with the penalty of 7000 marks—a punishment which struck a terror into all future judges; made every iota of a record be thenceforward most religiously preserved; and perhaps contributed not a little to encourage the scruples which prevailed afterwards with regard to the minutest errors in judicial proceedings.

The manner in which this inquiry about the judges was made, gives a trait of Edward's character and of that of the times. From the best consideration of the different accounts given of this transaction,<sup>1</sup> it does not appear to have passed in parliament, but to have been a mere exertion of regal power.

Indeed, Edward, through the whole of his reign, however he might exact from others an obedience to the laws, affected to place himself above the restraint of them. The ill grace with which he confirmed *Magna Charta*; his frequent breaches of it; his procuring a dispensation from the oath he had taken to observe it; his levying money without assent of parliament, even after the statute *de tallagio non concedendo*; all these are strong proofs how determined he was to preserve, if possible, the authority which had been once assumed by the crown.

Perhaps one of the strongest acts of power attempted since the granting of the Charters, was executed by Edward. This was when, by an edict signed by some barons then in parliament (but whilst all the prelates were violently excluded from thence), he put the whole body of the clergy out of the protection of law. "No manner of justice," said the ordinance, "shall be done them in any of the king's courts; but justice shall be *had against them* to every one that will complain and require it of us."<sup>2</sup>

It was common to issue letters of protection to stop the ordinary courts of justice: this occasioned the statute *de*

<sup>1</sup> *Parl. Hist.*, vol. i., 93, 94.

<sup>2</sup> *Ibid.*, 116.

*Protectionibus*.<sup>1</sup> This practice, however, continued afterwards, and was the subject of many complaints in the next two reigns.

It is unnecessary to observe that in this king's reign there are many more statutes extant than in that of Henry III. It is the opinion of some, that many more were enacted than those which have come down to us; otherwise, it is said, the sudden advance made in the law during this reign, beyond that of any other, could not be accounted for.

The authentic information derived from records is very much increased in this reign. The *Placita Parliamentaria*, collected and published by *Ryley*, contain many records of proceedings before the king in council, and so far give an insight into the nature of that kind of memorials. Besides these, there are extant judicial records of the king's bench, the common bench, and the eyre. It appears from these, that pleadings were very short but perspicuous, without involving the matter in any multiplicity of words. The records are for the most part orderly and clear, relating the several steps made in a suit, with the judgment thereon, and generally expressing the rule and reason upon which the judgment was given.<sup>2</sup>

There are some few broken notes of adjudged cases to be found in Fitzherbert's Abridgment; and there are said to be manuscript reports of this period in private hands, but not in any regular series.<sup>3</sup>

Among the steps this king had taken to promote the improvement of the law and the administration of justice, he caused some treatises to be composed,<sup>4</sup> of which *Fleta* and the treatises of Britton and Thornton are supposed to be some.

*Fleta, seu Commentarius Juris Anglicani* (for so it is entitled), is a treatise upon the whole law as it stood at the time this author wrote (*a*). It is

*Fleta.*

(*a*) *Fleta*—in this respect resembling Britton—appears to have incorporated the statute law of the time—for instance, the statutes of Westminster—in his text, which is a kind of commentary upon it, and thus he is quoted constantly by Lord Coke as explaining the true meaning. Thus, in commenting on the provision in the first statute of Westminster as to tolls, Lord Coke says, "*Fleta* collecteth the effect of this part of the act in these

<sup>1</sup> *Vide ante*, 544.

<sup>2</sup> Hale's *Hist. Com. Law*, 157.

<sup>3</sup> In Lincoln's Inn and the Middle Temple Libraries. Hale's *Hist. Ibid.*

<sup>4</sup> 35 Henry VI., 42 a.

divided into six books, the first whereof treats of the rights of persons, and of pleas of the crown; the second, of courts and officers; the third, of methods of acquiring titles to things; the fourth and fifth, of actions grounded upon a seisin, and of writs of entry; the sixth of a writ of right. The author of this work has followed Bracton in the manner and matter of it, having adopted his plan, and in many instances transcribed whole pages from him. He did not, however, confine himself to Bracton as his sole guide, but had also an eye to Glanville. Many obscure passages in those writers are illustrated by Fleta. It seems as if the author wrote with both these treatises, particularly Bracton's, before him, and that his design was to give a concise account of the law, with the alterations which had been made by parliament since Bracton wrote, supplying such parts as had been left untouched by him, and dilating upon others that had been passed over with too little attention. Thus Fleta serves as an appendix, and often as a commentary to Bracton. But if Fleta contains much which is not to be found in Bracton, it is deficient in much more which abounds in that author, most of the subjects so minutely discussed by Bracton being passed over in a very brief manner; so that, with all its new matter, this volume is not more than one-third of the size of Bracton. The writer of this commentary seems to have followed his master, Bracton, in his acquaintance with the canon and civil law, though he is less frequent in the use of them, and then it is in a manner less likely to mislead the reader. This author was wholly an imitator. As he followed Bracton in the design of his work, he has copied the *Præmium* from Glanville, *verbatim*; and, after all, the idea was borrowed from that prefixed to the *Institutes of Justinian*.

This book was written after the thirteenth year of the king, and not much later; at least the statutes towards the latter end of this reign are not mentioned, though that of Westminster 2 is frequently quoted. The occasion of the title to this book is given by the author him-

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words," and then quotes his version of it (*Fleta*, lib. ii., c. xliii.). So he says, "*Fleta* rendereth the last part of the statute in these words;" and then he again quotes him (2 *Inst.*, 222). So all through that book of the *Institutes* Lord Coke quotes *Fleta's* version of the older statutes, as affording a valuable commentary thereon.

self, who says it was written during his confinement in the *Fleet* prison.<sup>1</sup> From that circumstance it has been conjectured that he might be one of those lawyers who, for malpractices in their office as judges, were punished with imprisonment and pecuniary penalties.<sup>2</sup>

The small French tract under the name of *Britton* is thought to have been composed under the direction of Edward (a). The singular form of

Britton.

(a) This is the proper place in which to offer some account of Britton's treatise. Some notice of it, indeed, has already been taken in the note at the commencement of the reign, but it may be convenient here to offer a more complete analysis of it. It begins, as already mentioned, with a preamble, written in the name of the king, and is avowedly written at his direction. This fact, and the date at which it was written, are also ascertained as a matter of legal history, by the statement, already quoted, of Chief-justice Prisot, in the reign of Henry VI., that it was written at the desire of the king, two years after the first statute of Westminster (3 Edw. I.), which in part it recites. It commences with a preamble in the king's name, which has already been quoted. And the treatise of Britton is, at all events, clear, and each head or title is very distinctly treated of, and it affords very valuable exposition of the common law, and very useful explanation of the statute law of the age, while its study is a highly desirable, if not absolutely essential, preliminary to the study of the Year-Books, which our greatest lawyers have regarded as the richest repositories of the learning of our law. Lord Coke made great use of Britton, as well as Bracton and the *Mirror*, in his notes upon the old statutes (2 *Inst.*). It is to be observed that our author has in some instances had recourse to Britton for the illustrations of the law of this reign, and he might have done so more often with obvious advantage. The editor has ventured to add some references in the notes. The numbers and titles of the chapters in Britton's treatise (which is only divided into chapters, not books) are as follows, after the preamble or preliminary chapter:—Ch. 1. Coroners; 2. De eyres; 3. De chapiters (*i. e.*, the articles of presentments at the eyres, a chapter very much the same as that in Bracton, *De corona*); 4. De faudeours (forgers) de seales et de monoye; 5. De homicides; 6. De murdre; 7. De aventure; 8. De treson; 9. De arsons; 10. De burgessours (burglars); 11. De prisons; 12. De bannys; 13. De inlagerie (reversal of outlawry); 14. De rape; 15. De larcyns; 16. De abjuracions; 17. De troveurs (finders of treasure); 18. De droit de roy; 19. De franchises; 20. De pluseurs; 21. Torts; 22. De ministres (*i. e.*, del roy, as escheators, etc.); 23. De appels (or criminal prosecutions at the suit of the party); 24, 25. De appels de homicide; 26. De appels de robberies et de larcyns; 27. De appels de mahems; 28. De attachments; 29. De prises des avers; 30. De dette; 31. De tournes de viscontes; 32. De mesures; 33. De naifte; 34. De disseisine; 35. De purchas (*i. e.*, acquisition of real property); 36. De douns (donations of land); 37. De commun' purchas; 38, 39. De purchas conditionel; 40. De reversions et de escheates; 41. De purchas de villeyns; 42. De chartres; 43. De seisins; 44. De purchas de rent; 45. De disseisine (or assize of novel disseisin); 46. Ou assize ne gist point; 47. De remedie de disseisins; 48. De vues en disseisin; 49. De proces en assises; 50. De title de frank tenement; 51. De exceptions de brefe; 52. De exceptions a la persone le pleyn tyffe; 53. De exceptions al action; 54. De assisa turnes en jures; 55. De challenge

<sup>1</sup> In *Præm.*

<sup>2</sup> *Diss. ad. Flet.*, ch. 10.



it seems to countenance such a supposition, for the contents of the whole book are put into the king's mouth,

de jorours; 56. De judgment; 57. De apurtenance; 58. De commune depasture; 59. De remedie de disseisin de commune; 60. De amesurement depasture; 61. De quo jure; 62. De resonable estovers; 63. De nusances; 64. De remedie de nusances; 65. De exceptions de nusances; 66. De termes (*i. e.*, terms or leases); 67. De intrusion; 68. De gards (*i. e.*, wards); 69. De mariages (*i. e.*, of wards); 70. De homages; 71. De reliefs; 72. De mort d'ancestor; 73. De action mixte; 74. De heritage divisible; 75. De resonable partie; 76. De sommons; 77. De garaunt voucher (voucher to warranty); 78. De exceptions de mesne la descende; 79. De exceptions de la seisine; 80. De exception en son demeyne; 81. De exception de fee; 82. Exception de jour que il morust; 83. De taunt (tenure) des terres ovesque (avec) les apurtenances; 84. Exceptions puis le terme; 85. Exceptions de proeteigne bene; 86. Exceptions qui la terre tient; 87. Exception de felonie al action; 88. De assises tornes en jures; 89. De judgment; 90. De quod permittat; 91. De cosinage; 92. De assise de darreyn presentment; 93. De jour de plee; 94. De exceptions; 95. De exceptions hors de brefe; 96. De quare impedit; 97. Assise de utrum juris utrum (whether the land is of lay or ecclesiastical tenure); 98. De exceptions (*i. e.*, thereto); 99. De atteyntes (attaints of jurors for false verdicts); 100. On atteynte jeste (where attaint lay); 101. De exceptions (*i. e.*, thereto); 102. De proces de judgment; 103. De dowers; 104. De establishments de dower; 105. De assignement de dower; 106. De remedie de dower; 107. De guaranties (warranties of title); 108. De exceptions de mort; 109. De exceptions de concubinage; 110. De exceptions de pluralite de femmes; 111. De exceptions par l'ascent le prere; 112. De communes exceptions; 113. De judgment; 114. De plee de droit de dower; 115. De amesurement de dower; 116. De entre; 117. De proces; 118. De exceptions; 119. De droit de la properte; 120. De plus procheynate (*i. e.*, of the heir); 121. De succession; 122. De court de baron; 123. De sommons; 124. Dessoyns; 125. De essoyne de outre mer; 126. De essoyne de service le roy; 127. De essoyne de mal de venue; 128. De attornes. From this enumeration of the heads of the various chapters, it will be seen that the titles are more numerous and varied than in Bracton; while, on the other hand, they are treated, in general, more summarily, and with far less of scientific method or order, as also with far less learning—in fact, without any citation of authority; whereas Bracton is extremely methodical, regular, and elaborate, and appeals, wherever it is possible, to actual judicial authority. It is, on the whole, manifest that Britton's treatise is far inferior to that of Bracton, although, on the other hand, it is far superior to the *Mirror*, which is extremely loose and rambling, and often obscure and confused, owing to its being built on an older work. It will be observed that the book begins by a definition of jurisdictions and of courts of judicatures, and it is characteristic of the age, and of the reign of Edward I., that so much importance should be attached to matters of that nature, and, above all, to the sovereignty of the king as the source of justice, the origin of jurisdiction, and the guardian of law. And thus the jurisdiction of all courts, and the authority of every judicature, is deduced from the royal power. Thus the book goes on to describe the judicature emanating from the royal authority, "En primes en droit de vous mesmes, et de nostre court avons essint ordyne, que pur ceo que nous ne suffisons mye en nostro propre persone a oyer et terminer toutes quereles de people avons party nostre charge en plusurs partres si come icy est ordine." Then it defines the royal jurisdiction, "Nous volons que nostre jurisdiction soit sur toutes jurisdictions en nostre royaume essint que a toutes maneres de felonies, trespas, contractes, et en toutes maneres de

and the law so delivered has the appearance of being promulgated by the immediate voice of the sovereign. This

autres accions personnelles ou reales eyons poer a rendre et faire les jugements teles come ils afferrount sauns autre proces par la on nous savons la droite verite come juge." Then as to the judicature, first as to the marshal of the royal household and the origin of the king's bench, then as to justices itinerant and of "oyer and terminer." "Et outre ceo, volons nous que justices errauntz soient assignes de mesme le chapitres oyer et terminer en chescun counte de vii. ans and vii. ans." Then, as to the superior courts, great care was shown to preserve to the court of king's bench, which followed the king, the cognizance of all false judgments and appeals, which produced a plentiful harvest of fines, etc.: "De amendes faux jugements et de terminer appels et autres trespas faits encontre nostre fines," etc. Then, great care was shown as to the court of exchequer: "Aussi volons nous que a nous escheators a Westminster, et aillours eyent nos tresours et nos barons illeques jurisdiction et record de choses que touchent lour office; a oyer et determiner toutes les causes que touchent nos dettes, et aussi a nos fees et les incidents choses, sauns les quex teles choses ne purrount estre tries, et que il eyent poer a conustre de dettes que lou doit a nos dettours, par in nos puissons plus toft approcher a nostre." So that the court was to have power to entertain suits against persons indebted to the king's debtors; a wide extension of jurisdiction, which the *Mirror* mentions as a grievance. It is characteristic that, in Britton, far less interest is shown in the office of the sheriff, which had far more to do with the administration of justice, than in that of the coroner, who (as the title indicates) had to do with the pleas of the crown, and in those times had much more to do with profits accrued to the crown than he has now; and the very first sentence in which the duties of coroners are treated of, betrays the secret of this anxiety about their functions: "Et volons que come suite felonieas mes a ventre sont avenue ou que tresor soit trouve de soult terre, etc., le coroner hastivement mande al visconte," etc. So, great anxiety is shown about escheats, and the first thing to be done of persons indicted is to seize their lands and goods. Then comes a chapter on the justices in eyre, and the articles of eyre; the very first of which is stated to be one in which the crown would feel most interest: "De fauseours de seals et de monoye;" which latter is copiously treated of, the former being dismissed in a few lines. Then come chapters on homicide, murder, treason, and arson, all treated very cursorily and briefly. Then comes a long chapter on prisons, in which one of the first things pointed out is, that, if a prisoner escapes through the negligence of the officer, he is to be amerced 100 shillings by the justices in eyre, one of whose principal functions was to look after these amercements. Then comes a chapter on outlawry, of felons fugitives from justice, in which the great feature dwelt upon is forfeiture: "Et volons que chescun home definaunt nostre fees, forface ses chateau a nous," etc. After this, there is a chapter on finders of treasure, as to which careful inquiry is to be made: "Car tresor musce en terre et trouve, volons que soit nostre," etc. Then comes a chapter of some length, entitled "De droit le roi," which commences with the Church: "Et quant de nos fees soit enquis de esglises, cathedrales, parrochiales et religious, et de mesones de religion, et de hospitals en cet counte quex squnt de nostre avowson; et quex deyvent estre et ne sount mise; et quex demeynes nous tenons en nostre meyns, etc. Et aussi de avowsons de esglises, etc. Et aussi de escheates et de terres et tenements, alienes par felons, etc. Des enfauts, damoyseles, et wedues que mariages, duissent estre nos maries sauns conge de nous et combien cest que lour terres vaillent par an." Then there is a chapter, "De fraunchises," under which it is directed that inquiry is to be made as to all persons holding royal

work is shorter than the former, and is little more than a compendium. It is attributed by some to John Breton,

franchises, with a special view to discover any defaults which might warrant the crown in seizing them: "Et si ceux persones que sount defaute pour prise de mesme teles fraunchises par nous par lour tort demeyne nos volons que ils soient distreintz, etc. Et come ils viendront en court et ne se purrout desafabler de ceux torts, soit agarde que nous recoverons la franchise; et ils soient desherites de la value, ou en nostre mercy." Then there is a chapter, "De pluseurs torts," under which inquiry is to be made of roads and bridges: "De ponts et de causeys, et de commune cheymyns debruses, ou autrement male altyres, que les duist reperiller ou amender;" and here again special care is to be taken as to forfeitures: "Et si trouve que ceux teigment tenements de nos pur ceux chemyns amend, si soient ceux tenements pris en nostre meyn," and otherwise, "que illes soient en nostre mercy;" which meant that no mercy was to be shown to them: "Et soit comaunde au viscont que il les faux destreindre per lour avers et par lour chateux, et les distresses retenir jusques a taunt que ils eyent les defaultis amendis a tous les faits que mester serra." Inquiry is to be made, also, of all nuisances, and of all who have obstructed the execution of the judgments of the king's court, and who are to be punished by imprisonment and fine; also of lands aliened in mortmain, which are to be forfeited: "De terres et de tenements aliens en mortmeyn, et celles terres et ceux tenements soient pris en nostre meyn sauns replevin et les purchasours en nostre mercy." So of ecclesiastics who have held lay pleas: "Soit en quis de clerks que tenent ples de lay gents de autres choses que de testament et de matrimoyne ou de dymes ou que eyent juge ascun lay home en court christeine a ascune compuncion de argent; ou que ount la gent a fort *excommenge* et a tort fait pendre et imprisoner. Et ausi de ceux que ount autres greves par bulles, par double somonse a un jour en divers lieux per malice, et tous ceux soient punys par prison et per *fyn*." And finally, inquiry is to be made of all who had committed breaches either of statutes or of the common law: "Et de tous trespassours contre la fourme de nos estatutes," etc. Then follows a very long chapter, "De ministris," i. e., of the officers of the crown, the first of whom mentioned are the escheators: "De nos escheatours suit enquis queles terres ils eyent seisis en nostre meyn," etc. So as to fines and amercements: "Et ausi de viscontes que eyent par fyns et amerciamentes de gents de lour baillie;" and so of sheriffs or their bailiffs, *who have summoned people vexatiously and wrongfully on juries or inquests*; and so of a great number of other misdeeds, all which are to be punishable by *fine*. So that, whether the inquiry was of fines or forfeitures *already* secured to the crown, or of misdeeds in the king's officers which would warrant the imposition of fines, the inquiry would equally tend to the profit and emolument of the crown. Then, after chapters on appeals on homicide or other felonies, comes a chapter, "De attachements," showing how, when a man had commenced an action and sued out a writ, the first thing to be done was for the plaintiff to find pledges distrainable, and the next was for the sheriff to distrain the trespassers or wrong-doers: "A commencement deliver son brief al viscont, et fines trouve deux pleges destrey-nables a luy de suer sa pleynte et le viscont face destreyndre ces trespassours per lour avers ou per chateux" (97). And, above all, for every default there was to be an amercement; and the more defaults the more amercements: "Et come ascun que serra destreint viendra en court et ne pusse sa defaute savre tauntost soit ajuge a nostre mercy pursa de faute; et si plusurs defaute, plusurs soient amerciamentes" (103). Then it is provided, that rolls shall be made up of all fines and amercements, and returned into the exchequer: "Et tauntost soient les amerciamentes taxes, et les estretes envoyer a nostre eschequer

who was Bishop of Hereford, and a judge; but as he died in the third year of this king's reign, and this treatise takes notice of statutes made in the 13th, the truth of this account is justly doubted.<sup>1</sup> By others it is considered as nothing more than an abridgment of Bracton, with the subsequent alterations that had been made in the law, and that it is called *Britton* as one of the names of *Bracton* himself.<sup>2</sup>

This French tract, as it is written in the language which the law spoke for many years after, engages the curiosity of a modern reader in a particular manner. In the writ-

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et ausi de fyns et des chateaux de felons, etc.; soient enroules de deux roules dont l'un remeyne a coroner et al viscont et l'autre route auesque tous les roules del eyre soient envoyes a nostre eschequer, et sagement gardes en nostre tresore" (107). These are the rolls of the exchequer, which are of so much value to our legal antiquaries. Then comes a very long chapter of wrongful distresses: "De prises des avers," (evidently an important subject in those days,) always carefully providing that the offenders shall be in mercy, and ending by commanding that, if the distress shall have been against the peace—"en contre nostre pease"—the parties are to be made examples of by grievous amercements: "Et par grevous amercements que autres par les ample de eux soient chastises en casu semblables" (119). The next chapter treats of "Dette;" and at the outset it begins by stating that, in the counties, before the sheriffs and the suitors, they have pleas of trespass and debt, so that the goods, or the trespass, or the debt demanded, do not exceed 40s., and not of debts exceeding that sum, *without the king's writs*—"saun nos brefs"—which meant the payment of a fee for an original writ; the pretence for which, that it was necessary to give jurisdiction, was, as has been already pointed out, altogether deceptive, for more reasons than one; for, first, after the *first writ* of the kind issued, the jurisdiction of the court over all similar cases would be as well established as after a hundred such cases; and next, if it were not so, the jurisdiction of the courts might have been settled and assured once for all, by the terms of their commissions—and, indeed, in effect was so—by the definition of their jurisdiction previously laid down on the authority of the king himself. It was not, however, only the first fee on the writ which was involved in the question of suing in the king's superior court; there were all the fees, fines, and amercements imposed in the course of the litigation, which went into the royal treasury; and therefore it was said: "Et ces grauntz (great) trespasses, volons nous que soient plede defaults nous meines." This may suffice as an analysis of the work, and also as illustrations of the state of the law at the time it was written, which was after the statute of Westminster (as it is mentioned), and likewise as specimens of the language in which the Year-Books are written. The main importance, indeed, of Britton is, that a study of the work is, if not an essential, at all events a highly useful preliminary to the study of the Year-Books—those venerable repositories of early law and legal antiquities, without a knowledge of which, Lord Coke says, no one can be well-grounded as a lawyer, and without some acquaintance with which certainly a man can hardly have much knowledge of our legal history. The Year-Books begin with the next reign, so that they follow almost immediately upon Britton.

<sup>1</sup> Diss. ad Flet., ca. 2, 3.

<sup>2</sup> Ibid.

ings of Bracton and Fleta everything is seen as it were through a cloud, disguised in the terms and phraseology of the Latin tongue; whereas Britton addresses you in the technical, proper style of the law: you here perceive a determinate meaning, conveyed in precise terms, and are enabled to form an opinion from it with more confidence and certainty.

Another treatise composed in this reign, was that of Radulph de Hengham, who had been chief-justice, and was, for misconduct, degraded Hengham. from his office, with many others of his fellow-justices. This consists of two parts: one called *Summa Magna*, and the other *Summa Parva*. It seems to be a collection of notes relating to proceedings in actions; and must have proved extremely useful to a practiser of those times. The same may be said of the little French tract called *Fet Assavoir*, printed at the end of Fleta:

Chief-Justice Thornton made a *summa*, or abridgment of Bracton, containing most of the titles of the law in a concise form. Though a pro-Thornton. fessed epitomizer, he omits many things in that author, and does not adhere to his method.<sup>1</sup>

The foregoing writers, in addition to Glanville and Bracton, together with the *Mirror* (of which we defer saying anything till the next reign), must have thrown great light on the study of the law in these early ages, and were no doubt for a time of great authority with lawyers. It is true, that we do not find these authors cited in such reports of decisions as have come down to us; but, in later times, Lord Coke, in his inquiries into the grounds of our law, particularly in those works which were chiefly designed for the closet, begins all his investigations, where the subject will allow it, from these old tracts, and thence traces down the confirmations or alterations the law received in succeeding times. The changes which have happened in the law since that author's time, particularly by the abolition of tenures, have made these treatises less read than they were even in his days. Perhaps, of all of them, Fleta is that which is most frequently looked into, owing to its being written after many of King Edward's statutes, and to the comment which it sometimes gives upon them.

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<sup>1</sup> Diss. ad. Flet., ch. 24.

The chief of these writers are Glanville, Bracton, Fleta, and Britton. But the comparative merit of these four authors appears very different in the eyes of a modern reader. The copiousness, learning, and profoundness of Bracton places him very high above the rest. It is to him that we owe Fleta and Britton, which would probably never have existed without him. To him we are indebted for a thorough discussion of the principles and grounds of our old law, which had before lain in obscurity. But while we give to Bracton the praise that is due to him, as the father of legal learning, we must not forget what Bracton, as well as posterity, owe to others. Britton delivered some of this writer's matter in the proper language of the law, and Fleta illustrated some of his obscurities; while Glanville, who led the way, is still entitled to the veneration always due to those who first open the paths to science.

Among the monuments of the king's ecclesiastical law, are to be reckoned the provincial constitutions of Archbishop Peckham and Archbishop Winchelsea; but our national canon law acquired in this reign an ornament and support of a new kind. Among the numerous commentators and glossists on the civil and pontifical law, a man of learning stood forth to do equal honor to the English ecclesiastical law. John de Athona, by his copious commentary on the legatine constitutions of Cardinals Otto and Ottoboni, passed in the last reign, set the first example of that kind to our canonists, and laid the foundation of a future body of judicial learning for the guide of our clerical courts.<sup>1</sup>

Edward was extremely careful to provide his courts with persons properly qualified to practise there. In the 20th year of his reign,<sup>2</sup> he specially directed John de Mettingham, then chief-justice of the bench, and the rest of his fellow-justices of that court, to provide and appoint, according to their discretion, from every county, *attornatus et apprenticios, qui curiam sequantur; et se de negotiis in eadem curiâ intromittant, et alii non*. It appeared to the king and council that *seven score* would be sufficient; but the justices, if they saw fit, were authorized to exceed that number.<sup>3</sup>

<sup>1</sup> Duck. de Auth., lib. ii.

<sup>2</sup> Plac. Parl., 20 Edw. I., Rot. in dors.

<sup>3</sup> Ryl. Plac. Parl., 104.

The different orders of practisers are thus stated by Fleta: *servientes, narratores, attornati et apprenticii*.<sup>1</sup> The apprentices, it should seem, were students, who, it is said (and probably by the above ordinance), were first permitted by Edward I. to practise in the king's bench, in order to qualify themselves to become in a course of years *servientes*, or serjeants. Whether *servientes* and *narratores* (or, as they were called in French, *countors*) were two distinct orders, or *narrator* was only an additional description of a serjeant, may be doubted (*a*). It has commonly been taken in the latter sense, in stat. Westm. 1, c. xxix.,<sup>2</sup> where the same words come together, *si serjeant countor, ou outre*; and that statute ordains imprisonment for a year and a day on a person of that description who was guilty of any collusion in practice. As neither attorneys nor apprentices are mentioned in that statute, we may suppose such persons were not then entrusted with the conduct of business in court; if so, it is probable they had not that authority till the above ordinance; though it

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(*a*) From this and from the *Mirror* it appears that, at this time, there were regular pleaders, and, it is to be observed, that the pleading was oral. The authorities, even prior to the reign of Edward I., the treatises of Bracton, and Glanville, and the *Placitorum Abbrevatio*, which contain extracts from the records from the time of Richard I. to that of Edward II., exhibit the gradual growth of a system of pleading. And the very earliest reports in the Year-Books, which begin with the reign of Edward II., show the system in a very perfect state. Therefore Mr. Serjeant Stephen considers the reign of Edward I. as the period when it was fully established, not only as a system, but a science. In the very first year of Edward II., we find pleaders raising matters of law, and putting themselves upon the judgment of the court concerning them: "Nous demurrions en vos discretions si nous etions mest a respond" (*Year-Book*, 1 *Edw. II.*, 8. So 10 *Edw. III.*, 23). Thus also pleading in estoppel was understood (*Year-Book*, 17 *Edw. II.*, 534). The great practical object of pleading to bring out the question in dispute, and reduce it to a point, was as well understood at the end of this reign as at any other time, for, in the first year of the next, we find the court saying to a pleader: "Vous dites chose que veot avoir deux issues, tenez vous al une" (*Year-Book*, 1 *Edw. II.*, 14), a principle or rule, which might bear to be inferred in those early times when transactions were few and simple, but would soon become obstructive of justice; and as Mr. Serjeant Stephen points out, it did not prevail in the civil or canon law; in both of which the party could resort to as many exceptions as he pleased. "Pluribus defensionibus uti permittatur" (*Dig.*, 44, 60, 61, 111). "Nemo prohibetur pluribus exceptionibus uti quamvis diversæ sunt" (*Ibid.* 8). The judges and pleaders in this reign were, as will be seen in the *Mirror*, laymen, not well acquainted with the civil law, and hence pleading soon became perverted from its primitive simplicity and practical utility. In our times we have altered it.

<sup>1</sup> Lib. 2, c. xxxvii.

<sup>2</sup> *Vide ante*, 414.

may be observed, that Fleta speaks of them as equally subject to this punishment with serjeant countors.

The first mention of *capitalis justitiarius* of the bench is in the first year of Edward I. This style was now conferred, probably for the first time, in conformity with that of *capitalis justitiarius*, assumed in the latter part of Henry III., by the chief-justice in the king's bench.<sup>1</sup>

The salaries of the justices were at this time very uncertain, and, upon the whole, they sunk from what they had been in the reign of Henry III. Thomas de Weyland, chief-justice of the bench in 7 Edward I. had but £40 per annum, and the other justices there 40 marks. This continued the proportion in both benches till 25 Edward III., then the salary of the chief in the king's bench fell to 50 marks, that is, £33, 6s., 8d., while that of the chief of the bench was augmented to 100 marks; which may be considered as an evidence of the increase of business and attendance there. The chief baron had £40, the salaries of the other justices and barons were reduced to £20.<sup>2</sup>

It seems that it was thought too great a burden on the justices of the two benches to attend the assizes, according to the late statute of *nisi prius*; the king therefore appointed eight persons to take assizes, juries, and certificates; writs of assize, juries, and recognition, were to be directed to these, and to no other person, except *de speciali gratiâ regis*.<sup>3</sup>

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<sup>1</sup> Dugd. Or. Jur., 39.

<sup>2</sup> Ibid., 104.

<sup>3</sup> Ryl. Pla., 130.

















